IN THE CIRCUIT COURT OF THE 16th
JUDICIAL CIRCUIT IN AND FOR
MONROE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 07-CA-99-M

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

Plaintiffs,

vs.

CITY OF MARATHON, a municipality created
under the laws of the State of Florida and
MARATHON CITY COUNCIL,

Defendants.
_____/

FINAL JUDGMENT

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

1. This case involves events which unfolded over a period of time in excess of 60 years. The case also encompasses various events in the history of the Shands family, of which all 4 Plaintiffs are members. During the course of the trial, the Court was quite flexible with respect to admitting evidence over Defendants' objections about the Shands family and its members. Ultimately, much of said evidence turned out not to be relevant.

However, as stated by the Court during the trial and at the close of the case, the Court believed that it was important to allow the Plaintiffs to tell their story which featured the hopes and dreams and struggles and triumphs of a strong family of great character. Ultimately, of course, the case had to be decided by an objective application of the relevant facts as the Court found them to be to the pertinent law.

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

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

4. The island is approximately 7.91 acres and is located on the northside of US1, north of the east end of the airport, and north of a subdivision known as Sierra Estates. 5-25-21, Trial Trans. at 26-27. It is within approximately 300 yards to a quarter mile from Vaca Key. Id.

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

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

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

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

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

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

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

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

13. During the 6 years after acquiring the property, R.E. Shands engaged in research and planning and made infrequent trips to the Property in pursuit of his dream to connect the Property to the main island with a road or causeway and construct his family's residential vacation complex. Unfortunately, in 1963 he passed away at the age of 56 and could no longer plan nor act upon his dream. 5-24-21, Trial Trans at 71; Pltfs.' Ex. 9.

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

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

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

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

18. Beginning in 1963, Plaintiff Rodney Shands visited the Property by boat every few years to check on the island, confirm that it was unoccupied for purposes of adverse possession, and consider the development possibilities for the Property. 5-24-21, Trial Trans at 73, 76, 78-79, 80-81, 83-84. On some of the visits he was accompanied by one or more of his siblings. Id. None of the Plaintiffs ever spent the night on the island. 5-24-21, Trial Trans at 146-147.

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

20. While Rodney Shands visited the island every few years during this period, he never spoke to anyone at Monroe County or the City regarding the applicable land

development regulations, never obtained or reviewed any of the land development regulations, never filed any application to develop the Property, and did not retain the services of any contractor or architect to pursue development of the Property. He did however, personally prepare design sketches based on research of other properties within the Florida Keys. 5-24-21, Trial Trans. at 139-141, 142, 148.

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

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

23. Prior to 1986, the Property was within the jurisdiction of Monroe County and was zoned as "general use," which would have allowed, among other things, 1 residential unit per acre. 5-25-21, Trial Trans. at 38-39.

24. In 1979, the State of Florida designated most of Monroe County as an area of critical state concern. 5-25-21, Trial Trans. at 36-37.[1] The purpose of the designation was

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

to, among other things, establish a land use management system that protects the natural environment of the Florida Keys including "shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat" and "upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation (for example, hardwood hammocks and pinelands), dune ridges and beaches, wildlife, and their habitat." §§ 380.0552(2), (7), Fla. Stat.

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

26. This designation also resulted in the creation and adoption of the 1986 Monroe County Comprehensive Plan, which applied to all properties within unincorporated Monroe County. 5-25-21, Trial Trans. at 36-37, 40-41, 42-43.

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

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

public hearings, meetings, and workshops were often filled to capacity. 5-25-21, Trial Trans. at 45-47.

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

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

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

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

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

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

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

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

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

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

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

40. The beneficial use determination ("BUD") is a process by which the City evaluates the allegation that no beneficial use remains and can provide relief from the regulations by granting additional development potential, providing just compensation or if it so

determines, extending a purchase offer for the property. MARATHON, FLA., CODE § 202.99(b).

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

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

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

> I recommend that the City of Marathon grant a building permit for a single family home on the property, said application to exempt from the ROGO point requirement. If State or City regulations cannot be varied to allow the issuance of the permit, and the property is deemed environmentally desirable to the City, I recommend that the property be purchased for the appraised value of $3,000,000.00 (or some other mutually agreed upon price), which is specifically found to adequately compensate the Applicant for any reasonable investment expectations at the time of the purchase of the property.

Pltfs.' Ex. 15 at 4.

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

45. In 1993, Monroe County adopted its Rate of Growth Ordinance ("ROGO"), which created a competitive permit allocation system where those applications with the highest scores were awarded building permits to construct residential dwelling units. 5-25-21, Trial Trans. at 49-52, 54-55. The competitive point system guided development towards

areas with infrastructure and away from environmentally sensitive areas such as habitat for threatened or endangered species. Id.

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

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

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

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

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

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

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

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

54. The evidence indicates more than 50 lot dedications to the City for BPAS points in 2006 and 2007. 5-25-21, Trial Trans. at 78-8l. 92-93; Def.'s Ex. 6.

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

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

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

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

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

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

61. Marr identified six sales of properties between September 2005 and February 2008 (with only one sale coming after 2007) of properties sold for the purposes of dedicating them to the City to obtain BPAS points. 5-25-21, Trial Trans. at 127-130. Based on these sales, Marr concluded that the market value of property in the City in 2007 on a per BPAS point basis was $12,500 per point. 5-25-21, Trial Trans. at 129-130. Based on this analysis, Marr concluded that the fair market value of the Property in 2007 was $147,000 when sold for use as BPAS points. 5-25-21, Trial Trans. at 130.

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

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

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

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

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

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

comparators. For all these reasons, the Court rejects Gallaher's testimony as speculative and unreliable.

68. "Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of the power has been undertaken." Osceola County v. Best Diversified, Inc., 936 So. 2d 55, 59-60 (Fla. 5th DCA 2006). Whether a plaintiff has established a taking "is a question for the court in an inverse condemnation case." Fla. Dep't of Agric. & Consumer Servs. v. Mendez, 126 So. 3d 367, 375 (Fla. 4th DCA 2013).

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

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

71. Although "[t]he focus of [the first] factor is on the change in the fair market value of the subject property caused by the regulatory imposition," it "is not the sole indicia of the economic impact of the regulation. Rather, [courts have] indicated that, in assessing the severity of the economic impact of the regulations, 'the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored,' thereby requiring the court to compare 'the relationship of the owner's basis or investment' in the property before the alleged taking to the fair market value of the property after the alleged taking." Walcek v. United States, 49 Fed. Cl. 248, 258, 266 (2001), aff'd, 303 F.3d 1349 (Fed. Cir. 2002) (quoting Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed.Cir.1986), cert. denied, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987)).

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

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

74. Even taking into account the Father's initial investment, the evidence confirms that the Plaintiffs remain able to recoup the investment and more. The only evidence presented at trial regarding the Father's basis was the initial purchase price of the Property of $21,900. The evidence at trial also demonstrates that the Property could be sold for use as BPAS points for $147,000, a sixfold increase on the initial investment. Given that the Plaintiffs were able to recoup the investment in the Property, the first factor weighs in favor of finding that no taking occurred. See Collins, 118 So. 3d at 876 n7 (finding that no taking occurred and noting that "the evidence presented at trial showed relatively passive landowners who took minimal action towards the improvement or development of their respective properties and invested little into the development other than their initial purchase costs." (emphasis added)).

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

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

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

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

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

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

78. Based on the foregoing, the Court finds that the Plaintiffs' lack of investment-backed expectations combined with their ability to recoup significantly more than any initial investment establishes that no taking has occurred, and that judgment should be entered in favor of the City.

79. A finding that no taking occurred is in accordance with cases from the Third District that addressed taking claims under similar circumstances where the property owners -- like the Plaintiffs here -- have been longtime owners of property in the Florida Keys yet failed to pursue any development opportunities over decades of ownership. First, in Collins, the Third District addressed claims for inverse condemnation brought by several property

owners in the Florida Keys. 118 So. 3d at 874. After the trial court found in favor of the County as to all but one of the plaintiffs, the plaintiffs appealed. Id. In affirming entry of judgment in favor of the County, the Third District explained:

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

Id. at 876.

80. The Third District continued:

> the evidence presented at trial showed relatively passive landowners who took minimal action towards the improvement or development of their respective properties and invested little into the development other than their initial purchase costs. Under these facts, the trial court correctly found in favor of the appellees under the reasonable investment-backed expectation prong of Penn Central.

Id. at 876 n7.

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

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

83. The Third District affirmed the trial court's finding that no as-applied taking occurred because the plaintiff's failed to produce any evidence that the change in the land use regulations deprived them of the reasonable economic use of their property or frustrated a reasonable investment-backed expectation held at the time of purchase. Id. at 565 ("The record before us is devoid of fact evidence that the Beyers had any specific plan for developing the property, dating from the time of purchase in 1970, up to the present."), 566. It further explained:

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

Id. at 567.

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

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

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

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

86. The Court finds that the evidence at trial in this case is indistinguishable from Collins and Beyers. Just like the plaintiffs in those cases, the Plaintiffs were unable to present evidence that they took any meaningful, **investment backed** steps to develop the Property in the decades they or their immediate predecessors in interest owned the Property. Since the Property was purchased by their late father in the 1950s, neither the Plaintiffs nor their Mother (their predecessor in ownership) pursued any development opportunities for the Property until they allegedly applied for a dock permit in the early 2000s. Thus, just like the plaintiffs in Collins and Beyers who similarly failed to seek to develop the properties in the face of ever increasing regulations, the Plaintiffs cannot establish any reasonable investment backed expectations. See Shands I, 999 So. 2d at 724 ("Although R.E. Shands bought the property in 1956 with the idea to eventually build a family home on it, the Shands family's 'investment-backed expectations' were minimal at

best. The Shands had no specific development plan and only recently sought a dock permit. To be sure, they had not pursued any development of the property since it was purchased in 1956.").

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

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

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

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

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

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

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

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

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

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

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

claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

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

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

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

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

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

MARK H. JONES
CIRCUIT COURT JUDGE

Copies furnished:
Jeremy Talcott, Esq. (jtalcott@pacificlegal.org)
Robert H. Thomas, Esq. (rthomas@pacificlegal.org)
Michael T. Burke, Esq. (burke@jambg.com)
Hudson C. Gill, Esq. (hgill@jambg.com)

Kiren Mathews

From: Paula Puccio
Sent: Tuesday, August 31, 2021 9:25 AM
To: Incoming Lit
Subject: (4-1662) 2007-CA-99-M Shands v. City of Marathon
Attachments: 07-CA-99-M Final Judgment.pdf

A very sad day for the Shands and PLF. ☹

From: Robert Thomas <RThomas@pacificlegal.org>
Sent: Tuesday, August 31, 2021 11:04 AM
To: Paula Puccio <PPuccio@pacificlegal.org>
Subject: FW: 2007-CA-99-M Shands v. City of Marathon

From: Robert Thomas
Sent: Tuesday, August 31, 2021 11:01 AM
To: Jeremy Talcott <JTalcott@pacificlegal.org>; Kady Valois <KValois@pacificlegal.org>
Subject: FW: 2007-CA-99-M Shands v. City of Marathon

We get nothing, judgment for City.

Please send to Rodney with the note that the legal team and he should have a discussion after we read this, for our next steps (which I assume will include DCA appeal).

From: Devonna Alce <Devonna.Alce@KeysCourts.net>
Sent: Tuesday, August 31, 2021 10:59 AM
To: Jeremy Talcott <JTalcott@pacificlegal.org>; Robert Thomas <RThomas@pacificlegal.org>; Michael Burke <burke@jambg.com>; hgill@jambg.com
Subject: 2007-CA-99-M Shands v. City of Marathon

Good morning,

Please see attached Final Judgment in the above-referenced case.

Regards,

Devonna Alce
Judicial Assistant to Circuit Judge Mark H. Jones
16th Judicial Circuit of Florida
Freeman Justice Center
302 Fleming Street Key West, FL 33040
Phone: (305)-292-3422
Fax: (305)-292-3435
Devonna.Alce@keyscourts.net