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

RODNEY SHANDS, et al.,

Plaintiffs,

v.

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

Defendants.

_____/

Case No. 07-CA-99-M

Hon. Mark H. Jones

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Plaintiffs Rodney Shands, Robert Shands, Kathryn Edwards, and Thomas Shands (collectively, the Shands) respectfully move this Court for partial summary judgment pursuant to Florida Rule of Civil Procedure 1.510(a) against the City of Marathon and Marathon City Council (collectively, the City).

INTRODUCTION

In 1956, at the tail end of a long and illustrious career, Dr. R.E. Shands purchased Little Fat Deer Key. Dr. Shands was the long-time owner and operator of Shands Hospital, where he had instituted a policy of treating all without regard to ability to pay, years before the passage of Medicare and Medicaid. He had also served his country with exceptional gallantry during World War II as a surgeon, where—during the second wave of the invasion of Okinawa—Dr. Shands again demonstrated his outstanding compassion by treating equally wounded soldiers from both the American and Japanese armies. These accomplishments were so notable that—more than 30 years after his death—Congress and the State of Florida chose to honor his name by officially renaming the Key, "Shands Key."

Dr. Shands purchased the island with dreams of residential development. In furtherance of those dreams, in 1959 he purchased bay bottom adjacent to the island, and began creating plans to connect the Key to the main island with a road. Unfortunately, just four years later, Dr. Shands passed away without ever seeing his dream to completion. The island passed to his wife, who later transferred Shands Key to his four children.

Despite his lifetime of service, the City of Marathon now seeks to take from Dr. Shands' heirs all use and development of the island which now bears his name. The City's regulations have so completely stripped away all property rights from Shands Key that even a single permit for a small dock was considered unacceptable by the City and denied. Effectively, Shands Key has been pressed into service as an offshore nature preserve for the benefit of the City and its inhabitants, and the price tag for that preserve has been paid by the children of Dr. Shands, who are left with land they can use for little more than minimal recreation.

The Shands now ask this Court to hold, as a matter of law, that the City took all economic use of the Shands' property—the Florida Keys island formerly known as Little Fat Deer Key, now known as Shands Key—consistent with and within the meaning of the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and federal and Florida law applying *Lucas* in the years since. Specifically, the City deprived Shands Key of all or substantially all economically beneficial or productive use when it rejected the Special Master's Beneficial Use Determination. That Determination would have required the city to either: (1) permit the Shands to build a home on the island, or (2) pay three million dollars, or a mutually-agreed upon price, to compensate for the taking of their property. Therefore, when applying *Lucas* and its progeny to the facts of the case, this Court is compelled to enter a partial summary

judgment—on categorical takings liability under the federal constitution and, or in the alternative, state of Florida constitution—in the Shands' favor.

UNDISPUTED FACTS

1. In 1956, as described in the attached Written Declaration of Rodney Shands (Ex. 1), Dr. R.E. Shands (the father) purchased a 7.91-acre offshore island, then-named Little Fat Deer Key and later renamed Shands Key,[1] from the Federal Government. Ex. 1; Ex. 2 (purchaser's declaration & land patent letters).

2. Three years later, the Shands' father acquired seven acres of adjacent bay bottom from the State of Florida. Ex. 1; Ex. 2; Ex. 3 (island land patent/deed & Florida bay bottom deed).

3. The father purchased the property with the intent of building a vacation complex for his family. Ex. 4 (Rodney Shands' deposition at 24-25). In furtherance of his plan, the father hired an engineer to create plans to connect the island to the mainland. Ex. 1; Ex. 4 at 15–18, 60–61; Ex. 5 (R.E. Shands' island & connected road sketches).

4. However, before construction began, in 1963, the father passed away. Ex. 1.; Ex. 4 at 8, 23–24; Ex. 6 (R.E. Shands' death certificate).

5. The property then passed to the father's wife, the Shands' mother, who in turn conveyed the property, via general warranty deed, to their four children—the Shands. Ex. 1; Ex. 4 at 29; Ex. 7 (general warranty deed).

6. From the time of purchase until 1986, the property was within Monroe County and was zoned General Use. Ex. 8 (George Garrett deposition part I) at 6–8, 20–26.

[1] The U.S. Board on Geographic Names renamed the island Shands Key in 1999 to honor the father, Dr. R.E. Shands, for having operated a hospital that served the poor at no charge, and having served his nation admirably during World War II. *See* Ex. 1.

7. The General Use designation permitted the construction of one dwelling unit per acre; therefore, the Shands could potentially have built seven units on the island. Ex. 8 at 16–17, 20–25.

8. In 1986, Monroe County adopted a comprehensive plan and land use regulations that changed the property's zoning designation to "offshore island" and placed it within the "residential conservation future land use category." Ex. 4 at 31; Ex. 8 at 35–38.

9. Later, the City incorporated and adopted Monroe County's comprehensive plan and land use regulations. Ex. 8 at 7, 111–12. The comprehensive plan states "the principal purpose of the Conservation future land use category is to provide for the preservation of natural and historic resources and passive resource-based recreational uses." Comprehensive Plan, City of Marathon, Policy 1-3.1.4.[2]

10. The City's land use regulations also establish a maximum density of 0.1 dwelling units per acre for the Offshore Island zoning district. *See* Marathon Code § 130-157. Put another way, the new zoning classification only permits one buildable unit per every 10 acres. *See* Marathon Code § 130-157. Therefore, under the current land use regulations, no construction is permitted on the Property. Ex. 9 (City employee's site conditions letter).

11. In 2004, the Shands met with a contractor concerning the construction of a dock on the island. Ex. 4 at 31–34. The dock would have allowed the Shands to visit the island without having to use an anchor on the delicate submerged lands. Ex. 4 at 41–44.

12. However, in a "Letter of Current Site Conditions" dated September 24, 2004, the City informed the Shands that "[d]ue to the quality of the habitat on this island, development permits cannot be issued." Ex. 9. The letter also informed the Shands that six acres of their property could

[2] Comprehensive Plan available here: https://www.ci.marathon.fl.us/planning/page/comprehensive-plan-policy-document.

be used either as: (1) a lot dedication for points in the City's Rate of Growth Ordinance (ROGO) system,[3] or (2) transfer of development rights (TDRs). Ex. 9. If used as a lot dedication, those acres would be exchanged for 12 points in the City's ROGO system. Ex. 9.

13. In response to the City's letter, the Shands pursued an administrative remedy known as the Beneficial Use Determination process (BUD process). Ex. 10 (Special Master Thomas D. Wright's Beneficial Use Determination). The BUD process "provide[s] a procedure whereby landowners who believe they are deprived of all beneficial use may secure relief through an efficient non-judicial procedure." Marathon Code, Ord. No. 21-1998, § 4. To qualify for relief in a BUD proceeding, the applicant "must demonstrate that the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application deprive the applicant of all reasonable economic use of the property." Monroe County Code §§ 102-103, 102-109.

14. Notably, in referring to a BUD determination, the City's Future Land Use Element Goals, Objectives, and Policies states: "[t]he relief granted under a beneficial use or vested rights determination, shall be the minimum necessary to avoid a 'taking' of the property under state and federal law." Ex. 11 (Future Land Use Element Goals).

15. After an administrative hearing on the Shands' BUD application, the Special Master concluded the City's land use regulations took the Shands' property. Ex. 10. Therefore, the Special Master recommended:

> [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

[3] The ROGO system has since been replaced by the BPAS allocation system. *See* City of Marathon, Chapter 107, Art. 1, https://library.municode.com/fl/marathon/codes/code_of_ordinances?nodeId=PTIICOOR_APXALADERE_CH107GEDEST_ART1BUPEALSYBP.

> 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.

Ex. 10; Ex. 12 (Gallaher Affidavit). The Special Master's determination was based on his finding that the regulations "prohibit[] any development of the property under any circumstances." Ex. 10.

16. In response to the Special Master's determination, the Marathon City Council held a public hearing to consider his recommendation. Ex. 13 (Marathon Resolution 2007-38).

17. At the hearing, the Marathon City Council voted 3-2 to reject the Special Master's recommendations and to deny the Shands' beneficial use application. Ex. 13.

18. This suit followed. Ex. 1.

19. In 2007, the Court granted summary judgment to the City, finding that the applicable date of the taking claim was the 1986 adoption of the State Comprehensive Plan, in which the City zoned Shands Key as an "offshore island" and placed it in the "future land use" category, thus barring an inverse condemnation claim under the four-year statute of limitations. *Shands v. City of Marathon*, 999 So. 2d 718, 722 (Fla. 3d DCA 2008) (*Shands I*); Ex. 14 (copy of opinion).

20. The Third District Court of Appeal reversed, holding that the Shands' as-applied claim was "not ripe until the plaintiff has obtained a final decision regarding the application of the regulations to the plaintiff's property." *Id.* at 725; Ex. 14. Accordingly, the Shands' claim arose after the City rejected the Special Master's determination at public hearing. *Id.*; Ex. 14.

21. In 2017, the Court again granted summary judgment to the City, this time finding the facts of another Florida Keys taking case, *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. 3d DCA 2016), where the property owner had lost the case on appeal, was "indistinguishable from the instant case . . . ." *Shands v. City of Marathon*, 261 So. 3d 750, 752 (Fla. 3d DCA 2019) (*Shands II*); Ex. 15 (copy of opinion).

22. Florida's Third District Court of Appeal again reversed, holding that "an 'as applied' takings challenge can only be resolved based upon the impact of the regulation on a particular parcel of property," and distinguishing *Beyer*. *Id.* at 753; Ex. 15.

23. The Shands now move for summary judgment, contending that—as a matter of law which this Court should now acknowledge—the Marathon zoning ordinances, as-applied to Shands Key and effected by the City following the BUD pursuant to the zoning ordinances, have resulted in a *Lucas*-style *per se*, categorical taking of their property.

MEMORANDUM OF LAW

A motion for summary judgment should be granted "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Heredia v. John Beach & Assocs., Inc.*, 278 So. 3d 194, 196 (Fla. 2d DCA 2019), *reh'g denied* (Aug. 20, 2019) (quoting Fla. R. Civ. P. 1.510(c)). Once the movant meets that burden, the burden shifts to the opposing party to show the existence of such issues. *Holl v. Talcott*, 191 So. 2d 40, 43–44 (Fla. 1966).

It is an undisputed fact that no economic or productive use whatsoever is allowed on Shands Key. Here, as mentioned above, the Shands' father purchased the property with a dream of eventual residential development. In furtherance of his plan, the Shands' father purchased bay bottom rights and drew up plans to construct a road between his property and the mainland. However, the City later adopted regulations that stripped the property bare of the Shands' rights to use and develop their property. So complete is the destruction of their rights that the City denied even a permit for a small dock that would allow the Shands to more easily visit the island which now bears their father's name. The island is now effectively an offshore nature preserve, and yet

the City has chosen not to pay for the substantial conservation rights they have obtained in the Constitutionally prescribed manner—just and full compensation.

Where, as here, government regulation deprives the landowner of all such use, it constitutes a total regulatory taking that requires just compensation under the Takings Clause. The City's own Special Master recognized the devastating extent of the City's regulations, recommending that the City either permit the development of a single house or pay the Shands three million dollars as just compensation for the loss of all economic and productive use of their property. The City declined both options, choosing instead to prohibit all use of Shands Key, while offering the Shands a chit for ROGO points or TDRs. ROGO points and TDRs may amount to some form and portion of compensation for the taking—that is a question for the jury—but the assignment of ROGO points or TDRs do not alter the reality that the City has engaged in a total taking of Shands Key by eliminating all economic and productive use.[4]

I.

THE SHANDS ARE ASSERTING AN AS-APPLIED, CATEGORICAL TAKING OF SHANDS KEY

As an initial matter, the Shands note that they bring this motion for partial summary judgment as an *as-applied* challenge to whether the City's actions have effected a *categorical* takings of Shands Key, of the type outlined in *Lucas*, 505 U.S. 1003. While previous decisions of

[4] A simple hypothetical demonstrates that the island was taken out of use: if the Shands were to construct anything at all on the island, what would happen? Answer: Marathon would order any development of the island destroyed, as inconsistent with its denial of the BUD application and Monroe County's Comprehensive Plan and Marathon ordinances. And the courts would uphold that destruction for that reason. *See, e.g., Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 193–97 (Fla. 4th DCA 2001) (holding that court can order "complete demolition" of development where development was inconsistent with county's comprehensive plan).

Florida's Third District Court of Appeal have appeared to cloud these terms, critical legal distinctions between them require brief explanation.

A. Florida's Third District Court of Appeal's Previous Incorrect Usage of "Facial" in Place of Categorical Does Not Foreclose a *Lucas* Claim

In *Shands v. City of Marathon*, the Third District Court of Appeal correctly noted that the word "facial" is a term of art "more properly applied when evaluating the constitutional validity of a statute, regulation or ordinance, as in whether the ordinance is constitutional 'on its face.'" *Shands I*, 999 So. 2d at 722 n.8.[5] While the Third DCA continued to use the term "facial" within the opinion, it took pains to "point out that *in this context* the term refers to a *categorical, per se, taking, as used in Lucas . . .* " *Id.* (emphasis added).

This use of the term "facial" in both contexts has created the mistaken impression that the *timing* of a takings challenge depends upon the substantive test to be used to determine whether a takings has occurred. This is not so.[6] Here, the Shands raised a categorical, as-applied takings claim under *Lucas*. *See* Ex. 1. Under the City's ordinances, the Shands were provided with an administrative remedy to determine the extent of the City's zoning regulations, and seek either a variance or compensation if, indeed, the zoning regulations effected a taking. The Shands sought that administrative review, and obtained a BUD determination in their favor—urging the City to

[5] The same day *Shands I* was issued, Florida's Third District Court of Appeal ingrained this confusion in another opinion, *Collins v. Monroe Cty.*, 999 So. 2d 709, 713–14 (Fla. 3d DCA 2008) ("The question presented is whether the record shows that the Landowners were deprived by the enactment of the 2010 Comprehensive Plan of all economic use of their property, which amounts to a facial taking, or were deprived of substantial use of their property, but left with some economic value, which is an as-applied taking."). The same mistaken usage of "facial" in place of "categorical" also appears in *Shands II* and *Beyer II*. *See Shands II*, 261 So. 3d at 753; *and Beyer v. City of Marathon*, 197 So. 3d 563, 566 (Fla. 3d DCA 2013) (*Beyer II*).

[6] For an extended discussion of the Third District Court of Appeal's mistaken description of the applicable law, *see Ganson v. City of Marathon*, 222 So. 3d 17 (Fla. 3d DCA 2016) (Shepherd, J., dissenting from denial of reh'g en banc).

approve either limited residential development or the outright purchase of the island. The Shands' takings claim finally ripened on February 7, 2007, the date Marathon's City Council denied that recommendation, instead stripping the Shands of all use of their island while declining to issue full and just compensation. Therefore, the Shands' as-applied takings claim ripened on February 7, 2007, and this Court must now determine whether or not that injury constituted a taking.

B. An As-Applied Challenge—the Challenge Here—Is Different From a Facial Challenge

The Third District Court of Appeal's opinions in *Shands I* and *Shands II*, *Collins v. Monroe County*, and *Beyer/Ganson v. Marathon,* have unfortunately created confusion about facial versus as-applied challenges in their discussions of this term.[7]

Courts have used the term "facial takings" to describe a particular subset of regulatory takings challenges, one in which the extent of the taking is concrete and affixed as to all properties at the moment that an ordinance is passed. In that context, where the ordinance can be applied in "clear, specific ways to [a property] when enacted, and because any injury to [the property owner] was real and could be calculated in terms of reduced present value" at that time, the cause of action arises on the date of its enactment. *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1165 (4th

[7] It appears that the error stems from a Fourth District Court of Appeal case. In *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. 4th DCA 2002), Florida's Fourth District Court of Appeal correctly noted the difference between facial and per se takings, citing to *Taylor v. Village of N. Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995). In the next sentence, however, the court incorrectly stated that the deprivation of economic value required for a facial takings claim is: "[L]imited to 'the extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted.'" *Lost Tree Vill. Corp.,* 838 So. 2d at 572 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 329 (2002)). *Tahoe-Sierra* says no such thing. In that passage, the Supreme Court was correctly distinguishing the standard between *Lucas* categorical and *Penn Central* ad hoc takings. *Tahoe-Sierra*, 535 U.S. at 330 ("Anything less than a 'complete elimination of value,' or a 'total loss,' the Court acknowledged, would require the kind of analysis applied in *Penn Central.*"). Importantly, this hinged on the fact that the taking was "temporary," not permanent. *Id.* at 342. For a permanent taking, *Lucas* controls, and the taking is categorical. Where a moratorium imposes *Lucas*-style deprivations temporarily, *Tahoe-Sierra* suggests the ad hoc analysis is more likely appropriate.

Cir. 1991). By contrast, most takings inquiries will be "premature" until a landowner obtains a final decision from any "administrative compensation and review mechanisms" that are available. *Id.* at 1166. As then-Judge, now retired-Justice, Pariente discussed in *Taylor v. Village of North Palm Beach*:

> Generally, takings challenges fall broadly into two categories—facial takings claims and as-applied claims. In a facial takings claim, the landowner maintains that the mere enactment of the regulation constitutes a taking of all affected property *without adequate procedures to provide prompt, just compensation*. 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*.

Taylor, 659 So. at 1170–71 (internal citations removed) (emphasis added). While facial regulatory takings challenges are possible, they are generally difficult, because "mere enactment" of a piece of legislation cannot often be shown to effect a categorical taking of the property when the opportunity for a variance (or a BUD like what Marathon has in place) exists. *See Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981).

As-applied takings challenges are generally not ripe until a landowner has first sought relief from a land-use board—precisely as the Shands sought before the BUD Special Master. Because of the "high degree of discretion characteristically possessed by land-use boards" to grant variances or other relief, there must generally first be a final decision as to "how a takings plaintiff's own land may be used . . . ". *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 738 (1997).[8] In other words, the Supreme Court's ripeness cases stand for "the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo*

[8] While the Supreme Court has since pared back its ripeness requirements substantially, the requirement to obtain a final decision remains in place. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2169 (2019).

v. Rhode Island, 533 U.S. 606, 620 (2001). Once such a final decision has been made as to the use of the landowner's property, the landowner may bring an inverse condemnation action.

In *Lucas* itself, the Supreme Court explicitly noted that South Carolina's Beachfront Management Act (which had prohibited all development seaward of a legislatively established line) had been amended to authorize "special permits" for the construction of habitable structures, and determined that "these considerations would preclude review . . . on ripeness grounds" had the South Carolina Supreme Court not chosen to instead dispose of Lucas's takings claim on the merits. *Lucas*, 505 U.S. at 1010–11. The Court acknowledged that Lucas could choose to apply (after remand) for a permit for construction, and then similarly challenge any denial of that permit in a future as-applied takings claim. *Id.* at 1011.[9]

"Florida courts have adopted the federal ripeness policy." *Shands I*, 999 So. 2d at 725. Accordingly, most takings cases must be challenged as-applied, once a final decision has been made as to any available use of the subject property. *See Lost Tree Vill. Corp.*, 838 So. 2d at 572 ("[W]e conclude that the claim does not state a facial takings claim because the mere enactment of the regulations does not preclude all development in all cases."); *and Taylor*, 659 So. 2d at 1173–74 ("The hard and final decision of how much development will be allowed must be made at the governmental level before a court can analyze that decision to see if it has effected a compensable taking.") (citation omitted). As Florida's Third District Court of Appeal noted in *Shands II*, "an 'as applied' takings challenge can only be resolved based upon the impact of the regulation on a particular parcel of property." *Shands II*, 261 So. 3d at 753. Nor could the Shands

[9] There was disagreement among the Court about whether the claim presented in *Lucas* was, in fact, facial. *Lucas*, 505 U.S. at 1042 n.4 (1992) ("Lucas has brought an as-applied challenge.") (Blackmun, J., dissenting).

have brought their claim before the determination was made. *Shands I*, 999 So. 2d at 726 ("A 'final determination' *requires* at least one meaningful application.") (emphasis added).

The Shands' situation falls well within this framework. The Shands do not contend that the City's zoning—on its face—deprives them of substantially all use of their property. This is because the City's BUD ordinance expressly provides a process for the Shands to seek either a variance or compensation. *Shands I*, 999 So. 2d at 726 ("The BUD process is in place to determine to what uses the property may reasonably be put under the current land use regulations.").

The Shands sought such review, and the Special Master recommended that the City either grant a variance for at least one permitted residential development or pay the Shands three million dollars (or a mutually agreed upon sum) for the loss of substantially all use of Shands Key *precisely because* all parties agreed that the City's zoning "prohibits any development of the property under any circumstances." Ex. 10. It was only after the City instead denied the Shands all use that the as-applied challenge ripened.

C. Categorical Takings Inquiries Are Different from Ad Hoc Takings Inquiries

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. Similarly, the Florida Constitution guarantees that private property shall not be taken except for a public purpose and with "full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Fla. Const. art. X, § 6. Florida courts interpret Florida's own Constitutional takings clause coextensively with the U.S. Constitution, and therefore follow federal takings law. *See St. Johns River Water Mgmt. Dist. v. Koontz,* 77 So. 3d 1220, 1226 (Fla. 2011) (holding that the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution are interpreted coextensively), *rev'd on other grounds*, 570 U.S. 595 (2013).

"Condemnation" occurs when government sues to directly appropriate private property under its inherent sovereign eminent domain power. Inverse condemnation, on the other hand, occurs when a property owner sues the government, alleging that it has taken private property without just compensation. If a taking is established in an inverse condemnation action, "full and just compensation is required" in the same manner as would be required in a direct condemnation action. *See Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc.*, 521 So. 2d 101, 105 (Fla. 1988); *and Volusia Cty. v. Pickens*, 439 So. 2d 276, 277 (Fla. 5th DCA 1983) ("Florida courts have frequently applied the same rules to both proceedings on the grounds of logic and fairness.").

A "regulatory takings claim" is a type of inverse condemnation claim that alleges regulation and/or other government action has so impacted private property that the effect is indistinguishable from a direct condemnation. "[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Once a regulation is found to constitute a taking, the government may choose between paying just compensation or removing the regulation. *See City of St. Petersburg v. Bowen*, 675 So. 2d 626, 629 (Fla. 2d DCA 1996) ("Regulations found by the courts to be invalid because they deprive landowners of substantially all use of their property without compensation are not ordinarily struck down as unconstitutional. The government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation.").

While the Supreme Court has often had difficulty discerning "how far is 'too far,'" there are two categories of regulatory action that "will be deemed *per se* takings for Fifth Amendment purposes." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). As the Supreme Court summarized in *Lingle*:

> First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. *See Loretto*

> *v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. *Lucas,* 505 U.S., at 1019 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id.* at 1026–1032.

Lingle, 544 U.S. at 538 (parallel citations omitted). The Shands assert that *Lucas* applies here. Because the City has precluded any economic or productive use of Shands Key, the property has been subject to a total regulatory taking, and no background principles of nuisance or property law will relieve the City of liability.[10]

Even where government action does not fall within one of the two types of categorical takings, the government may still be liable for a taking where regulation "goes too far." All other such regulatory takings must be evaluated as an ad hoc, factual inquiry using the factors outlined in *Penn Central*. *Lingle*, 544 U.S. at 538 (citing to *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). Ultimately, the *Penn Central*, taking inquiry turns "upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 540.

Though the Shands complaint brings claims for both a categorical, *per se* taking under *Lucas* and a taking under the *Penn Central ad hoc* inquiry, for the purposes of this summary judgment motion, the Shands are arguing only the categorical *Lucas* claim.

[10] The Florida Legislature has provided additional protection beyond that afforded by the State and Federal Constitutions in the Bert J. Harris Act, which extends protection to government action that places an "inordinate burden" on property, even where an owner cannot satisfy the constitutional standards for a taking. *See City of Jacksonville v. Smith*, 159 So. 3d 888, 892 (Fla. 1st DCA 2015); Fla. Stat. § 70.001(1) (2015).

II.

THE SHANDS HAVE BEEN DEPRIVED OF SUBSTANTIALLY ALL ECONOMICALLY BENEFICIAL OR PRODUCTIVE USE OF SHANDS KEY

Florida courts have routinely cited to *Lucas* as the definitive decision establishing the standard for a categorical, *per se* taking due to the elimination of "all economically beneficial or productive use of land." *See, e.g.*, *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 870 (Fla. 2001). Courts have also recognized that the loss of *all* use is not required to effect a taking; instead, a taking will be found when regulation "denies substantially all economically beneficial or productive use of land." *Tampa-Hillsborough Cty. Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994), *as clarified* (June 23, 1994); *Palazzolo*, 533 U.S. at 631 ("[A] State may not evade the duty to compensate on the premise that the landowner is left with a token interest.").

Because the facts here are directly analogous to *Lucas*, and because there are no inherent restrictions to the Shands' title under common law principles of nuisance, the City must be liable for the taking of Shands Key.

A. The Facts of *Lucas* Are Directly Analogous

In *Lucas*, a property owner owned two vacant beachfront lots on the South Carolina coast. *Lucas*, 505 U.S. at 1006. The lots had been zoned to allow the construction of single-family homes, and the immediately adjacent lots had already been developed with homes. *Id.* at 1008. Before Lucas had developed either property, however, South Carolina passed the Beachfront Management Act. *Id.* Under the Act, government was authorized to establish a "baseline" that, once established, would prohibit any development waterward of that baseline. Because the baseline was fixed landward of Lucas' two lots, all residential development was precluded on his property under the Act—although certain non-habitable developments such as wooden walkways and small decks

could be permitted. *Id.* at 1009 n.2. Despite these few remaining uses, the Act "require[ed] [Lucas'] land to be left substantially in its natural state . . . ." *Id.* at 1018.

The Supreme 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).

The Shands find themselves in a nearly identical situation—in fact, they have even less ability to develop than Lucas possessed. Where Lucas could have potentially developed non-habitable "wooden walkways" or a "small wooden deck," the City has informed the Shands that even a small dock, allowing them to more easily reach their island, is impermissible under the City's Comprehensive Plan. Ex. 9. According to the City, "*development permits cannot be issued*." *Id*.; *see also* Ex. 16 at 198 ¶ 16–18 ("Q: Okay. So there's a flat out prohibition on building a house on this island because it's not large enough, correct?").[11]

Stripped of all potential for development, the Shands have even less use of Shands Key than the plaintiff had in *Lucas*. The deprivation of the Shands' property rights goes well beyond "substantially all economically beneficial or productive use." It is absolute.

B. There Are No Inherent Restrictions Within the Shands' Title

If a government action denies a property owner all economically beneficial productive use, the government must pay compensation, unless "the proscribed use interests were not part of [the property owner's] title to begin with." *Lucas*, 505 U.S. at 1027. These proscribed uses are limited

[11] The City's expert suggested that the one permissible use of Shands Key would be the placement of a radio or telecommunications tower. Ex. 8 at 38. However, given the fact that Shands Key does not currently have electricity, even that use would be a "conditional use," and no party asserts that the Shands' expectations, or their parents' expectations, when the island was purchased or at any time thereafter were to use Shands Key for a "radio or telecommunications tower." The tower is nothing but a red herring in this case on these facts.

to "background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. As the Supreme Court explained, this means that any such regulations must simply "duplicate the result that could have been achieved in the courts" under existing state nuisance law. *Id.* Limitations of these types "cannot be newly legislated or decreed (without compensation) . . . .". *Id.* The examples given by the Court outline the limited nature of these proscribed interests: landfilling operations that would have the effect of flooding others' land or attempts to operate a nuclear generating plant astride an earthquake fault line. *Id.* at 1029.

The *Lucas* Court distinguished such longstanding state nuisance principles with "essential uses" such as "the erection of any habitable or productive improvements . . . ." *Lucas*, 505 U.S. at 1031. These more typical "economically productive or beneficial uses of land" of the type allowed under background principles of state property law could not be prohibited without compensation. *Id.* at 1030.

The Shands' father acquired fee simple title to Little Fat Deer Key in 1956 through purchase of a patent from the United States Government. Ex. 2. The only reservation on the deed was the retention of the mineral rights in oil and gas underlying the island. *Id.* No other restrictive covenants or easements were placed on the property, which—at that time—was zoned for up to seven residential properties. Nothing in the background principles of property law within the State of Florida inhibits the Shands' ability to develop Shands Key with "habitable or productive improvements" and the City may not remove such "essential uses" by fiat. *Lucas*, 505 U.S. at 1031; *see generally Jamieson v. Town of Fort Myers Beach*, 292 So. 3d 880, 885 (Fla. 2d DCA 2020) (summary judgment on takings claim in favor of government reversed where wetland designation prohibited residential development of approximately 37 of 40 properties). Because

Shands Key is deprived of all economically beneficial and productive use, the Shands are entitled to just and full compensation.

III.

TDRs AND ROGO POINTS ARE IRRELEVANT TO TAKINGS LIABILITY

In light of this, it is anticipated the City will argue that the availability of TDRs and ROGO points means the Shands' property was not categorically taken within the meaning of *Lucas*. Specifically, the City will argue the Shands retain some economic value, via TDRs and ROGO points, even though they have lost use of the island itself. This Court should reject that argument. The availability of TDRs and ROGO points has no bearing on whether the Shands' property has been taken. While the availability of TDRs and ROGO points go to the question of compensation for a taking, their availability has no impact on whether substantially all productive use of the property has been taken. Consequently, in the context of this motion, TDRs and ROGO points are irrelevant.

A. TDRs and ROGO Points Are Not Property Rights

1. TDRs do not obviate the taking of the Shands' property

TDRs utilize market mechanisms to incentivize a planner-preferred redistribution of development rights within a jurisdiction. Arthur C. Nelson et al., *The TDR Handbook: Designing and Implementing Transfer of Development Rights Programs* xiv (2d ed. 2011). The City's program purports 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, MuniCode.[12] For properties where development is

[12] https://library.municode.com/fl/marathon/codes/code_of_ordinances?nodeId=PTIICOOR_APXALADERE_CH110DE_ART3DETE.

permitted this provides a choice: you may use your density units to develop your own property, or you may forgo use and development and sell the TDRs to someone else.

But the situation is starkly different for the Shands, because the City has prohibited use and development of their island absolutely. In a case like this, TDRs cannot be utilized by the owner; their only value is to generate density credits for sale *to a third party*, who can then use them to develop the third party's own property. The Shands cannot themselves do anything with the TDRs. They cannot develop their island; therefore, they have no development rights to their property. Once an owner's inherent right to develop her own property is extinguished, her rights are effectively taken—and government is liable for the taking. *See Suitum*, 520 U.S. at 747 (Scalia, J., concurring in part) ("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.").

2. ROGO points also do not obviate the taking of the Shands' island

The ROGO points system, in place when the City denied the Shands all economic and beneficial use of their island, has been replaced by the Building Permit Allocation System (BPAS). Like ROGO, the BPAS system is designed "to manage the rate of new development to protect the quality of life for residents and retain the predominately small scale character of development in the City[.]" Marathon Code § 107. The City limits the issuance of residential development permits to 30 units per year. *Id.* at § 107.02. Property owners seeking to develop must first submit an application for allocation. *See id.* at § 107.07.

Applications are "scored" according to statutory criteria and given a corresponding number of "points." *Id.* at § 107.07(F); § 107.09. For example, a voluntary reduction of the density of proposed development can earn an application extra points. *Id.* at § 107.09(B)(1). Points are also awarded for cash donations and land dedications to the City. *Id.* In addition to points earned based on statutory criteria, applications passively generate one point per year. *Id.* Some factors, such as

the presence of high-quality hammock in a proposed development area, preclude the award of any points. *Id.* The applications are ranked ordinally based on score. *Id.* at § 107.07(G). Permit allocations are made from the highest rank descending until the statutory limit is reached. *Id.* at § 107.07(G)(2). In other words, for residential dwelling units, only the thirty highest-scoring applications will receive a permit allocation. The rest will have to wait until the next year. *See id.* at § 107.08. This delay can go on forever.

Like TDRs, the availability of BPAS points is irrelevant to the question of whether a taking has occurred, and for essentially the same reasons. The fact that the Shands can earn up to 12 BPAS points by dedicating portions of Shands Key to the City does nothing to preserve their rights to productive and beneficial use of their island. Such points cannot be used to build on the island itself; they could only help *a different property* to move ahead in the city's permit allocation system. *See* Ex. 8 at 83. Because the Shands own no other property in the City, the points are worthless. Their only potential value is in sale to a third party—value which may be entirely hypothetical, since lot dedications are evidently unpopular among the City's developers. *See* Ex. 8 at 91 (explaining that no lot dedications had been made in the preceding five years). Whatever value the points have might form a part of the just compensation that is owed to the Shands, but they do not affect the City's liability for taking Shands Key. What matters for takings liability is that the Shands can make no productive use of their property.

As far as the Shands are concerned, TDRs and BPAS points are *not* development rights allowing the productive use of Shands Key. Both of these schemes are government granted entitlements to a "chit" to be applied towards a different piece of property, *see Suitum*, 520 U.S. 725, 747 (Scalia, J., concurring), and cannot substitute for the Shands' right to use and develop Shands Key as an inherent—and essential—aspect of property ownership.

While the Shands concede that the City may take that right from them, it must immediately pay just and full compensation in return. It failed to do so.

B. TDRs and ROGO Points Are Not Material to Takings Liability in a *Lucas* Claim

The Shands' *Lucas* claim requires a showing that the City's denial of their permit application denied them of "all economically beneficial or productive use of [their] land." *Lucas*, 505 U.S. at 1015. Here, in effect, the City has declared "off-limits" precisely the type of "essential use" that all landowners would expect by right under Florida state law—the development of "habitable or productive improvements." *See Lucas*, 505 U.S. at 1030–31; *see also* Fla. Const. art. X, § 6. As the Special Master found, the City's zoning ordinances serve to prohibit the construction of any habitable or non-habitable productive structure.

The City may argue that TDRs represent economic *value* retained by the Shands because of the property. But the *Lucas* test analyzes "economically beneficial or productive *use*" of property, not value. *Lucas*, 505 U.S. at 1015 (emphasis added); *see id.* at 1018 (the "basis for permitting the government, by regulation, to affect *property values* without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all *economically beneficial uses*.") (emphasis added); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 350 (2002) (it is a mistake to read *Lucas* as being "fundamentally concerned with value," rather than with "economically beneficial or productive use.") (Rehnquist, C.J., dissenting).

And this must be so, if the *Lucas* categorical taking rule is to have any effect at all. It is almost inconceivable that regulation could truly eliminate *all* economic value in otherwise valuable real estate. *See, e.g., 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), *aff'd in part and vacated in part*, 791 F.2d at 902 ("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."). Even the property at issue in *Lucas* retained market value based on "the contingency, which soon came to fruition, that the development ban would be amended." *Tahoe-Sierra*, 535 U.S. at 350 (Rehnquist, C.J., dissenting). That the Shands could sell TDRs or BPAS points, thereby enabling some other landowner to develop on some other property, does nothing to change the fact that the Shands can make no productive *use* of their own land. The City has "pressed [the land] into some form of public service," and forced the Shands alone to bear a burden which, in fairness and justice, should be borne by the public as a whole. *See Lucas*, 505 U.S. at 1018; *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[13]

[13] To be sure, the Supreme Court held that TDRs may in limited circumstances allow a local government to elide a *partial* taking in *Penn Central*, 438 U.S. 104. But that is of no moment in a categorical taking claim, like the claim before the Court in this motion for partial summary judgment. But even in a partial taking claim under *Penn Central*, it's unclear whether TDRs will obviate a taking where the landowner has no other holdings within the area and has had all development prohibited on his own property. Consider the landowner's holdings in *Penn Central*: it owned one of "New York City's most famous buildings," *Penn Central*, 438 U.S. at 115—Grand Central Terminal. Indeed, Grand Central Terminal is one of the most famous train stations in the world. And Penn Central wished to develop the property *even more*—by utilizing its air rights above Grand Central Terminal. Moreover, Penn Central had other properties nearby. The Supreme Court recognized that Penn Central had the use of its property—the aforementioned Grand Central Station—and the government's decision to offer Penn Central transferrable rights in exchange for preventing Penn Central from expanding upon Grand Central Station did not amount to a partial taking of the property, in part because Penn Central could then apply the transferred "rights" to its other properties—allowing it to exceed existing height limits on those other properties. This case is not even remotely comparable. The Shands do not have the use of a building like Grand Central Station on the island; far from it. They also have no other nearby properties to transfer "rights" to in order to develop in Marathon or the Keys. They have the use of nothing on the island, and the Comprehensive Plan and the City's decision to deny the Shands' BUD application has rendered the island completely unusable to the Shands forevermore. *Penn Central* is legally and factually

C. The Value of TDRs and ROGO Points Is Only Pertinent—if at all—to Whether Just and Full Compensation Has Been Paid

To the extent the TDRs or ROGO points possess any economic value, they constitute at most a measure of the *compensation* paid to a takings claimant. As Justice Scalia explained in his partial concurrence in *Suitum*, 520 U.S. at 747.

> The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land. The latter is valuable, to be sure, but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking.

Id. More recently, the Supreme Court recognized the principle behind Justice Scalia's concurrence, noting that "any payment from the Government in connection with [a taking] goes, at most, to the question of just compensation." *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015) (citing *Suitum*, 520 U.S. at 747–48 (Scalia, J., concurring in part)). The TDRs and ROGO points here represent the kind of scheme Chief Justice Roberts was describing in *Horne*: the grant of valuable instruments does not obviate the take. It only goes to "the question of just compensation." *Id.*

The measure of just compensation is the "market value of the property at the time of the taking." *See, e.g., Horne*, 576 U.S. at 353 (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984)). The obligation to compensate arises on the date of the taking. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). And if payment is delayed, compensation must generally consist of the total value of the property when taken, plus interest from that time. *Knick*, 139 S. Ct. at 2170. TDRs, however, represent not concurrent compensation in full, but a future, speculative

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distinguishable. *Suitum*, 520 U.S. at 749 (Scalia, J., concurring) ("If *Penn Central*'s one-paragraph expedition into the realm of TDRs were not distinguishable in this fashion, it would deserve to be overruled.").

value perhaps but not necessarily tied to the property that is taken. *See* Nelson, *supra* at 10–11.[14] Whatever minimal value the Shands may ultimately be able to fetch for TDRs or ROGO points is only relevant to the damages/compensation phase of the takings jury trial, and to how much more the City must pay to ensure that the Shands receive full, just compensation.

CONCLUSION

The Shands have been denied all or substantially all economically beneficial or productive use of their property. Because the City's denial of the beneficial use determination and prohibition of any use of the island represents a *per se*, categorical taking of the Shands' property, the Shands are entitled to full and just compensation as a matter of law. The Shands therefore respectfully request this Court enter partial summary judgment in their favor on the City's liability for a *Lucas* take, pursuant to both their federal and state takings claims, and move directly to a jury trial on the value, if any, of the TDR and ROGO points offered by the City, and the amount of compensation they are due for the take.

[14] TDR values are notoriously lower than the value of the otherwise developable property from which they are taken. The transaction costs involved in finding a willing buyer further lower whatever potential compensation those TDRs and ROGO points might represent. Nelson, *supra* at 11. In any case, the City's own expert has effectively admitted that there is currently almost no market at all for TDRs and ROGO points in the City of Marathon, Ex. 8 at 171–79.

DATED: July 8, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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