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

Case No. 3D21-1987

RODNEY E. SHANDS, et al.,
Appellants,

v.

CITY OF MARATHON, et al.,
Appellees.

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

APPELLANTS' REPLY BRIEF

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I. The Answer Brief Looks Past the As-Applied *Lucas* Claim

A. The City Assumes That Personal Camping Is an Economically-Beneficial Use

The Answer Brief does assert that the residual value of Shands Key (between 1.1% and 4.9% of its prior value) reflects an economically-beneficial use. And it cannot be assumed, as the City does, that camping is such a use simply because someone might have been willing to buy Shands Key for that purpose. Ans. Br. 32-33. The City does not make any attempt to make the required connection between the property's residual value and the question the City leaves unanswered: is personal camping an economically-beneficial use? *See Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 950 F.3d 610, 628 (9th Cir. 2020) ("[T]he relevant inquiry for us is whether the land's residual value *reflected a token interest or was attributable to noneconomic use*.") (emphasis added), *cert. denied*, 141 S. Ct. 731 (2021). Thus, contrary to the City's argument, residual value standing alone does not defeat a *Lucas* claim when there is no concurrent showing that residual value stems from an economic use. "Absent more," a "less than total" deprivation of value is not enough

to defeat a *Lucas* claim. *Id.* For example, in *Bridge Aina Le'a*, the Ninth Circuit recognized that downzoning the property to agriculture left it with a remaining value of $6.36 million. But its analysis did not stop there, and it determined this value was a reflection of the myriad possible economic uses remaining under agricultural zoning, such as rock quarrying or as a site for a sewage treatment plant. *Id.* at 629.

The City, by contrast, never made that connection, either at trial or in its Answer Brief. Nor has the City disputed that offshore island zoning "require[s] [the] land to be left substantially in its natural state" forever free of development, which "carr[ies] with [it] a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. S.C. Coastal Council*, 505 U.S. 1005, 1018 (1992).[1]

Finally, the City offers nothing in response to the argument that the sole use of Shands Key the circuit court identified as beneficial use—the sale of Shands Key to a third party (who could, in turn,

[1] As the U.S. Supreme Court holds, "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001). The City acknowledges that a regulation that leaves a "token interest" only is still a taking. *See* Ans. Br. 33.

donate the island to the City in return for ROGO/BPAS chits to move the buyer's other property up in the City's permit queue)—does not qualify as a *Lucas* "economically-beneficial use." R. 1233 (Judgment ¶ 59) ("[T]he Property had market value in 2007 when sold for personal use or for use as ROGO or BPAS points."). As the Federal Circuit recognized, "it is unreasonable to define land use as including the sale of the land." *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015). *See* Init. Br. 27-33.

B. Law of the Case Did Not Bar an As-Applied *Lucas* Claim

Instead of responding to these arguments, the City asserts the circuit court correctly concluded the Shands were procedurally foreclosed from an as-applied *Lucas* takings claim. The City argues that this Court, in *Shands v. City of Marathon*, 999 So. 2d 718, 725 (Fla. 3d DCA 2008) (*Shands I*), and *Shands v. City of Marathon*, 261 So. 3d 750, 753 (Fla. 3d DCA 2019) (*Shands II*), already resolved the *Lucas* claim, and this is "law of the case." *See* Ans. Br. 29-31. But law of the case "requires that questions of law *actually decided* on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Engle v. Liggett*

Grp., Inc., 945 So. 2d 1246, 1266 (Fla. 2006) (emphasis added) (quoting *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001)). As our Initial Brief explains, in *Shands I* and *Shands II* this Court never ruled the Shands were barred from pursuing an as-applied *Lucas* claim. Instead, this Court merely concluded the Shands could not raise a "categorical, *facial* takings claim." *Shands I*, 999 So. 2d at 725 (emphasis added). *See* Init. Br. 23-25 & n.13 (explaining the difference between "facial" and "as-applied" takings claims).[2] Indeed, this Court recognized the Shands are not asserting a facial challenge to the enactment of the Comprehensive Plan. *Shands I*, 999 So. 2d at 725 (the Shands could not bring an as-applied takings claim until they "obtained a final decision regarding the application of the regulations to the plaintiff's property"). *See also*

[2] The Court correctly described facial claims as those challenging the "mere enactment" of the 2010 Comprehensive Plan. It concluded that such claims could not be pursued here because the enactment of the Plan, standing alone, "did not preclude all economic use and value" (presumably because the City might permit some beneficial use of Shands Key after a Beneficial Use Determination). *Id.*; *see also Shands II*, 261 So. 3d at 753 ("[A]n earlier dismissal of this case based on the statute of limitations was reversed precisely because we characterized the Shands' claim as being 'as applied' and not 'facial.'").

Init. Br. 24 n.13.[3] The Shands have never asserted a facial takings claim, and consequently, this Court has never considered such a claim, much less issued a ruling now barring it. In short, neither opinion foreclosed an as-applied claim of any kind, and there is no prior ruling (an "actual decision" as the Florida Supreme Court put it in *Engle* and *Juliano*) barring the Shands' as-applied *Lucas* claim, and thus there is nothing on which to base a law of the case argument.

But even if *Shands I* and *Shands II* concluded that a "facial" taking refers to a "categorical" (*Lucas*) taking and law of the case applies, this Court should now repudiate any such conclusion. The law of the case doctrine is not intended to institutionalize an error simply because it was already made, and "does not rigidly bind a court to its former decisions; it is only addressed to its 'good sense.'" *3M Elec. Corp. v. Vigoa*, 443 So. 2d 111, 112 (Fla. 3d DCA 1983)

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[3] A facial claim would require that all impacts of the regulation be known at the time the challenged regulations were adopted. *See* Init. Br. 2-13. But the impact to the Shands was not known until the City rejected the Special Master's Beneficial Use Determination recommendation, which was the City's final decision confirming that Shands Key is subject to offshore island zoning use restrictions. *Shands I*, 999 So. 2d at 725.

(internal citations removed). After all, the court's first duty is to get the law right and it "should not hesitate" to "mitigate any damage" from a prior ruling. *VLX Properties, Inc. v. S. States Utilities, Inc.*, 792 So. 2d 504, 509 (Fla. 5th DCA 2001) ("Neither this court nor the law is served by our adhering to a previous position which we now believe to be wrong."). Here, the most compelling reason to repudiate any prior decision conflating facial claims with *Lucas* claims is that it conflicts with the U.S. Supreme Court, which recognizes that *Lucas* claims may be asserted "as-applied." The claim in *Lucas*, after all, was as-applied. *See Lucas*, 505 U.S. at 1042 n.4 (Blackmun, J., dissenting) ("Here, of course, Lucas has brought an as-applied challenge.").

If that alone were not sufficient, last year the U.S. Supreme Court expressly rejected an argument that as-applied takings challenges may only be considered under the *ad hoc Penn Central* test. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021) (rejecting the dissent's argument that California's labor regulation "must be assessed 'under *Penn Central*'s fact-intensive test'" and instead finding an as-applied, categorical physical taking). This intervening ruling by a higher court deprived the City's law of the

case argument of any force it might otherwise have. *See Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965) ("Another clear example of a case in which an exception to the general rule should be made results from an intervening decision by a higher court contrary to the decision reached on the former appeal, the correction of the error making unnecessary an appeal to the higher court.").[4]

C. *Collins* and *Beyer* Are Wrong

These same reasons also compel rejection of the City's alternative argument that as-applied *Lucas* claims are generally prohibited in this District by *Collins v. Monroe Cnty.*, 999 So. 2d 709 (Fla. 3d DCA 2008), and *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. 3d DCA 2013). Ans. Br. 58-59. As detailed above, the U.S. Supreme Court has held otherwise, and that alone is enough to reject the City's argument. As Judge Shepherd further explained, the legal error in limiting categorical *Lucas* claims to facial challenges is clear

[4] *See also Brunner Enters., Inc. v. Dep't of Revenue*, 452 So. 2d 550, 553 (Fla. 1984) (intervening decisions by higher courts justify a court abandoning a prior ruling); *3M Elec.*, 443 So. 2d at 112 (where an intervening decision by a higher court is contrary to the holdings of previous appeals, "the law of the case *should be corrected*" so that the aggrieved party will not be required to resort to a higher court for relief).

from *Lucas* itself. *See Ganson v. City of Marathon*, 222 So. 3d 17, 21 (Fla. 3d DCA 2016) (Shepherd, J., dissenting from denial of rehearing en banc) ("In *Lucas,* the property owner brought an as-applied challenge, not a facial taking challenge, under the theory that he had been deprived of all economically viable use of his property."); *see also Lucas*, 505 U.S. at 1042 n.4 (Blackmun, J., dissenting) ("Here, of course, Lucas has brought an as-applied challenge.").

Thus, if *Collins* and *Beyer* are read to foreclose entirely as-applied *Lucas* takings claims, they are not controlling because they "disregard decades of settled Supreme Court . . . precedent." *See State v. Poole*, 297 So. 3d 487, 506 (Fla. 2020) (where precedent is used incorrectly to disregard decades of settled Supreme Court and Florida precedent, it is unreasonable for a Court to *not* correct those erroneous holdings), *reh'g denied, clarification granted,* No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020), and *cert. denied sub nom. Poole v. Fla.*, 141 S. Ct. 1051 (2021).

II. The City Misapplies the Three *Penn Central* Factors

A. Economic Impact Is Measured By "Analyzing Permissible Uses Before and After Enactment of the Regulation," Not Residual Value

To avoid the circuit court's disregard of the required analysis of economic impact—comparing the before and after value of Shands Key—the Answer Brief conflates the test for a *Lucas* taking (does the property retain any economically-beneficial use under the challenged regulation) with *Penn Central*'s economic impact factor (a comparison of the property's value before-and-after the challenged regulation applied to the property). *See* Ans. Br. 38 (arguing that the "*retained value* of the subject properties" proved the Shands suffered no economic impacts from the downzoning) (emphasis added).

But *Penn Central* does not ask whether the property has retained value (that is the *Lucas* question), but rather what "economic impact the regulation has on the claimant," a critically different inquiry. Thus, this Court has twice remanded this case to determine the "specific impact" of the regulation on Shands Key, holding that *Penn Central* "requires . . . '*analyzing permissible uses before and after enactment of the regulation.*'" *Shands I*, 999 So. 2d at 723 (emphasis added) (quoting *Taylor v. Vill. of North Palm Beach*,

659 So. 2d 1167, 1171 n.1 (Fla. 4th DCA 1995)). That is a far different inquiry than what the Answer Brief advocates for. Applying the *Shands I* test for economic impact shows a minimum loss of market value of 95.1%, with a maximum loss of 98.9% of value. By any standard, the Shands suffered massive economic impact.

B. "Investment-Backed Expectations" Does Not Turn on Whether the Owner Has Taken Additional Steps To Develop

The Answer Brief also wrongly asserts that an owner's expectations at the time of acquisition play no part in *Penn Central*'s investment-backed expectations factor, and that the sole inquiry is whether the Shands spent "hundreds of thousands of dollars, over many years, pursuing multiple efforts to improve and develop the property." *See* Ans. Br. 49. But that is not the right test. Rather, the reasonable investment-backed expectations factor looks at things like the property's use (both before and after the enactment of the offending regulation) and the owner's expectations at the time of acquisition, and weighs these against all other relevant factors, including background principles of property law. *Palazzolo,* 533 U.S. at 629-30.

The Answer Brief does not dispute that when Dr. Shands purchased the island from the federal government—and also at the time that his widow passed the property on to their children—Shands Key was not subject to the restrictive offshore island zoning which was imposed only relatively recently. R. 1172 (Ex. 7). The Shands need not have undertaken any additional steps to develop in order to have reasonable expectations. *Palazzolo*, 533 U.S. at 627 ("Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."). The Shands' expectations were reasonable: when Dr. Shands bought it, and later when it was transferred to his widow and children, the island was zoned GU and there was no impediment to development of at least seven homes on the island. Init. Br. 4-5; R. 126. The record contains no contrary claim or evidence.

The circuit court, however, did not consider these expectations, but concluded instead that the Shands did not "establish *any* investment-backed expectations" because they had not actively engaged in a race to vest their right to develop by proposing a specific project and then spent enough money chasing that proposal. R. 1225 (Judgment ¶ 77) (emphasis added). *See*, *e.g.*, *Town of Longboat Key*

v. Mezrah, 467 So. 2d 488, 491 (Fla. 2d DCA 1985) (developer obtained vested right by investing in "plans, engineering, and specifications"). The Answer Brief sticks to that same point.

But whether the Shands took sufficient "steps to develop" would be dispositive only if they were seeking judicial confirmation they possess vested rights. *See Ganson*, 222 So. 3d at 26-27 (Shepherd, J. dissenting from denial of rehearing en banc). Vested rights and investment-backed expectations in takings are supported by different rationales and have different remedies. Vested rights protect an owner's reliance interests, with courts concluding that if the owner has taken concrete steps to develop based on some assurance from government that it could move forward, it is unfair to allow the government to stop the project even if it changes the governing regulations. *See Texas Co. v. Town of Miami Springs*, 44 So. 2d 808, 809 (Fla. 1950). Had the Shands raised a vested rights claim, the City would correctly be focusing solely on their post-acquisition expenditures to secure development permits, and if those expenditures were significant enough the Shands would be entitled to an injunction barring the City from denying a building permit. *See, e.g.*, *Monroe Cnty. v. Ambrose*, 866 So. 2d 707, 712 (Fla. 3d DCA

2003) (per curiam) ("We also conclude that the subsequently enacted land regulations do not apply to the Landowners who are determined to have vested rights."). But that is not their claim.

By contrast, the investment-backed expectations requirement is not intended as a mechanism by which landowners must rush to spend enough to vest their right to complete a development, or risk being deemed to have no investment-backed expectations. Rather, asking whether owners have some expectation that they can make use of their property prohibits those plaintiffs who may claim they bought with the expectation of developing, when in fact the circumstances show otherwise. Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. Law. 215, 235-36 (1995) ("Investment-backed expectations held by property owners *arise at the time of purchase* and the information they have *then* about their property gives them meaning.") (emphasis added). Dr. Shands purchased the island from the United States in fee simple and in return received a federal patent. Regardless of whether, after that, the Shands spent even more to pursue a specific project in no way weakens the undisputed evidence at trial confirming that he reasonably expected at the time of purchase that the property could

be developed for residential use. *See* Init. Br. 5-6.[5] This makes sense, because in contrast to vested rights, the default remedy for a taking is just compensation. The Fifth Amendment is not designed to compensate an individual for the cost of steps taken to develop a property. Rather, compensation is owed when government "restrict[s] a property owner's ability to use his own property." *Cedar Point*, 141 S. Ct. at 2072. An owner's expenditures and steps to develop the property may go to the land's highest and best use, but that is relevant only to the amount of compensation, not whether there has been a taking.

Thus, in each of the cases relied on by the Answer Brief the question was not whether the owners had invested a sufficient amount—either at the time of acquisition or after—to generate

[5] Of course, additional post-acquisition expenditures would add additional weight to an owner's expectations, and the expenditure of enough money to vest development rights would allow the owner to obtain an injunction compelling the government to issue development permits. *See*, *e.g.*, *FBT Everett Realty, LLC v. Mass. Gaming Comm'n*, 187 N.E.3d 373, 385 (Mass. 2022) ("postacquisition investments can sometimes give rise to reasonable investment-backed expectations"). But that in no way transforms *Penn Central*'s "expectations" analysis into one that turns on vested rights.

investment-backed expectations.[6] The present case is in an entirely different posture because at the time of initial acquisition and the later inter-family transfers, the Shands' expectations were that they could build on their property—and those expectations were genuine, backed by investment, and, most importantly, the law. *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) ("'not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them'") (citation omitted). The Shands do not suggest that their expectations at the time of

[6] These cases stand only for the unremarkable proposition that an owner's *unreasonable* expectations (correctly described) do not qualify, therefore weighing heavily against a taking in balancing the other two *Penn Central* considerations. For example, in *Golden Pacific Bancorp v. United States,* the court rejected a takings claim where a bank holding company had purchased a substantial amount of stock in a bank that was seized when the bank became insolvent. *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1069 (Fed. Cir. 1994). The Federal Circuit emphasized that applicable federal laws expressly authorized the government to declare a bank insolvent and place it in receivership. *Id.* at 1073. By voluntarily purchasing shares within a highly regulated industry subject to those regulations, it was not reasonable for Golden Pacific to believe that "government 'would fail to enforce the applicable statutes and regulations.'" *Id.* at 1074. Importantly, none of these cases reject *Penn Central* liability simply because of an insufficient *amount* of the investment. Rather, all three disposed of the claims because the plaintiffs' expectations—regardless of their investment—could not have been reasonable at the time of purchase.

acquisition are controlling, only that the circuit court's failure to even consider those expectations is error.

C. The Character of the Government Action Is Critical and Cannot Be Ignored

The City argues the circuit court correctly ignored the third *Penn Central* factor, arguing that it is enough for the circuit court to determine only "two of the factors." Ans. Br. 38. It asserts the circuit court said nothing about the character of the government action factor because the investment-backed expectations factor may have "such force" that it disposes of the entire takings claim. Ans. Br. 38-42. That may be true enough, any one of the *Penn Central* factors may ultimately be so compelling that it drives the conclusion.[7] But such a conclusion may only be reached after the court has actually considered all three factors. The court may not say, for example, that it is persuaded by one factor so there is no need to look at the others.

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[7] *Compare Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (disposing of a takings claim because Monsanto could not have any reasonable expectation that its data would be kept private by the government), *with Hodel v. Irving*, 481 U.S. 704, 717 (1987) (finding a taking where the "character of the government regulation" destroyed a category of property rights even where there were likely zero investment-backed expectations).

Especially here, where character of the City's actions is extraordinary: it has impressed what amounts to a conservation easement on Shands Key—which remains vacant and economically idle, "protected" and "preserved" in its natural condition. Highlighting the unprecedented character of offshore island zoning is the City's assertion that the only uses that may be made of Shands Key is as a personal campsite, *or by donating it to the City*. In other words, by merely leveraging its regulatory power, the City would be able to obtain a public aquatic park for absolutely no cost.

Thus, a *Penn Central* determination may only be reached after a "careful examination and weighing of *all* the relevant circumstances." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 303 (2002).[8] The Second District has held that

[8] *See also Clayland Farm Ent., LLC v. Talbot Cnty.*, 987 F.3d 346, 353 (4th Cir. 2021) ("*Penn Central* requires this Court to balance 'a complex of factors.'") (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933, 1937 (2017)); *Bridge Aina Le'a* , 950 F.3d at 625 (*Penn Central* requires "careful examination and weighing of all the relevant circumstances."); *Dist. Intown Props. Ltd. P'ship v. D.C.*, 198 F.3d 874, 879 (D.C. Cir. 1999) (takings claims should be considered "on an *ad hoc* basis, with three primary [*Penn Central*] factors weighing in the balance").

a "meaningful" *Penn Central* analysis requires the court review all three factors:

> The circuit court focused on Gwynn's loss of the potential rentals available before the enactment of the ordinance but did not weigh this loss with the property's value based on the residual uses after the enactment. By failing to weigh the before and after values of the property, the circuit court did not determine the economic impact of the ordinance on the property owner as required by *Penn Central* and its progeny; this was a departure from the essential requirements of the law.

City of Venice v. Gwynn, 76 So. 3d 401, 405 (Fla. 2d DCA 2011).

While one factor may certainly outweigh the others, that balancing can only be conducted if the reviewing court actually considers all of the factors. There is nothing in the circuit court's ruling indicating that it did so. The approach the circuit court should have undertaken is illustrated by a recent decision by the Supreme Judicial Court of Massachusetts, which held that all three factors "should be taken into account." *FBT Everett Realty*, 187 N.E.3d at 382. The court first concluded that the developer likely did not have reasonable investment-backed expectations in the use of its property for gambling. But the court did not stop there and held the other two factors "must be considered." *Id.* at 385. Accordingly, the court reversed the trial court's entry of summary judgment in favor of the

government, and remanded for an inquiry into all three factors. *Id.* at 392.

CONCLUSION

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

DATED this 9th day of September, 2022.

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I hereby certify that on September 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the Florida Third District Court of Appeal by using the E-Filing Portal, and that a true and correct copy was served upon the following by email:

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The undersigned hereby certifies that this computer-generated brief complies with the word limit requirements of Rule 9.210(a)(2)(B) and contains 3,981 words, and the font requirements of Rule 9.045(b) of the Florida Rules of Appellate Procedure, as submitted in Bookman Old Style 14-point font.

DATED: September 9, 2022.

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