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

CASE NO. 3D21-1987
L.T. No. 07-CA-99-M

RODNEY SHANDS, ROBERT SHANDS,
KATHRYN EDWARDS and THOMAS SHANDS

Appellants,

v.

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

Appellee.

APPELLEE CITY'S ANSWER BRIEF

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Nature of the Case

This case involves a claim for inverse condemnation brought by the Appellants/Plaintiffs, RODNEY SHANDS, ROBERT SHANDS, KATHRYN EDWARDS, and THOMAS SHANDS' ("Shands"), alleging a regulatory taking by the Appellee/Defendant, CITY OF MARATHON ("City"). The Shands appeal (1) an order denying their motion for partial summary judgment entered on September 16, 2020, and (2) the Final Judgment entered on August 31, 2021, following a two-day bench trial. R. at 1265-1296.

The Facts

A. The Parties and Subject Property

The Plaintiffs are four siblings who own an offshore island located within the City. May 25, 2021, Trial Transcript[1] at 36-38, 108.

[1] The trial transcript from this proceeding was filed by the parties as a stipulated supplement to the record on appeal and will hereafter be cited as "[Trial Date] Trial Trans."

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

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 know 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.

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; R. at 1379-1380 (Pltfs.' Ex. 12).

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; R. at 1379-1380 (Pltfs.' Ex. 12).

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.

B. The Subject Property's History

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. R. at 1360-67 (Pltfs.' Exs. 5, 6); 5-24-21, Trial Trans at 56.

Following the purchase, the Father retained a surveyor to prepare a sketch of the bay bottom surrounding the island for the purpose of purchasing it. 5-24-21, Trial Trans at 60-61; R. at 1551 (Pltfs.' Ex. 30).

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; R. at 1369 (Pltfs.' Ex. 8). The two parcels are hereinafter collectively referred to as "Property."

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; R. at 1553 (Pltfs.' Ex. 32).

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.

In 1963, the Father passed away. 5-24-21, Trial Trans at 71; R. at 1372 (Pltfs.' Ex. 9).

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.

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

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; R. at 1374-1375 (Pltfs.' Ex. 10). The Plaintiffs did not pay any money to the Mother for the Property. 5-24-21, Trial Trans at 110, 135.

No evidence was presented at trial that the Mother or the Plaintiffs took any action towards the development of the Property between 1963 and 2004. 5-24-21, Trial Trans at 137-138.

Beginning in 1963, the 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.

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.

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 never retained the services of any contractor or architect to pursue development of the Property. 5-24-21, Trial Trans. at 139-141, 142, 148.

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.

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.

C. The Applicable Land Development Regulations

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.

In 1979, the State of Florida designated most of Monroe County as an area of critical state concern. [2] 5-25-21, Trial Trans. at 36-37.

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[2] Florida Administrative Code Rule 28-29.002 states that the following area is 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

The purpose of the designation was 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.

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

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governments;

(3) Federal properties; and

(4) Area within the incorporated boundaries of the City of Key West.

The City is included within the area designated as the Florida Keys Area of Critical State Concern.

upon approval by the state land planning agency." § 380.0552(9), Fla. Stat.

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.

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.

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.

Notice was not provided to each individual landowner because it was not required by statute and would have involved sending notices to the owners of more than 95,000 individual parcels in Monroe County. 5-25-21, Trial Trans. at 45.

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

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 their specific properties and also appeal the designation. 5-25-21, Trial Trans. at 46-47, 48-49.

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

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; R. at 1379-1380 (Pltfs.' Ex. 12).

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

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. R. at 1623-1631 (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. R. at 1632-1687 (Def's. Exs. 3, 4, 5).

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.

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.

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.

D. The Beneficial Use Determination

In January 2006, the Shands filed an Application for Determination of Beneficial Use with the City. R. at 1410-1413 (Pltfs.' Ex. 15); 5-24-21, Trial Trans. at 124-125.

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).

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.

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.

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.

R. at 1413 (Pltfs.' Ex. 15).

On February 27, 2007, the City Commission rejected the hearing officer's December 11, 2006, recommendation. R. at 1415-1416 (Pltfs.' Ex. 16).

E. The Rate of Growth Ordinance and Building Permit Allocation System

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.

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.

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

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.

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, it was generally similar to the ROGO system. Id.

When a property owner applies for an allocation and corresponding building permit, the property is 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.

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

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, 84-85, 86-87, 94. Under the latter scenario, the selling property owner remains the fee simple owner of the property. Id.

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.

The evidence at trial established 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; R. at 1688-1689 (Def.'s Ex. 6).

F. The Property's Value in 2007

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, the Property is only 7.91 acres. Id.

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

In addition, the Property would also be worth 12 points in the City's BPAS system and .6 transferable development rights ("TDRs"). R. at 1379-1380 (Pltfs.' Ex. 12); 5-25-21, Trial Trans. at 89-92.

The Property's 12 BPAS Points 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.

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

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.

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.

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

Marr prepared a similar analysis of offshore islands 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.

At trial, the Shands presented the testimony of Robert Gallaher, the expert appraiser retained by the Plaintiffs. 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.

In forming his opinion, Gallaher used the extraction method whereby he identified the purported sales of alleged comparator parcels 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. Gallaher used developed mainland lots to come up with the price per square foot for purposes of extraction, id. at 189-190, relied upon contracts for sales that never closed, id. at 181, and used of sales of developed islands that included either a bridge or a dock lot for access. Id. at 182-184.

The Property has neither a bridge to it nor a dock lot and is therefore not similar to islands that have such access points.

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.

Course of the Proceeding Below

On April 4, 2007, the Shands brought suit against the City claiming that the City's acts resulted in an as-applied regulatory taking of their property without just compensation in violation of state and federal law. R. at 167-176; see Shands v. City of Marathon), 999 So. 2d 718, 722 (Fla. 3d DCA 2008) ("Shands I"). On November 30, 2007, the Trial Court dismissed the Shands' state claim finding that it was barred by the four-year statute of limitations and the Shands' federal claim because it was not ripe where the Complaint failed to allege that the Shands had previously sought, and been denied, relief under state law. Shands I, 999 So. 2d at 722.

The Shands appealed the order granting the motion to dismiss. Shands I, 999 So. 2d at 722. As a threshold matter, the trial court found that "the Shands' cause of action for inverse condemnation d[id] not state a categorical, facial takings claim, because the mere

enactment of the 1986 State Comprehensive Plan, or the City's subsequent adoption of the 2010 Comprehensive Plan, did not preclude all economic use and value." Id. at 725. Instead, the Court "conclude[d] that the facts in this case present[ed] an as-applied taking cause of action." Id.

This Court then reversed. First, it found that the federal takings claim was ripe for judicial review based on the Shands' utilization of the BUD process and the City's rejection of the Special Master's finding following the BUD process. Id. at 725-726.

Second, it found that the state claim was not time-barred. This Court concluded that "[a]s this [wa]s not a claim for a facial taking, but an as applied taking, it follow[ed] that the statute of limitations did not begin to run until February 27, 2007, when the City of Marathon rejected with finality the Special Master's BUD recommendation and denied the Shands' BUD application, and thus the Shands' state claim was timely filed within the four-year statute of limitations[.]" Id. at 726–27.

Following remand and based upon the agreement of the parties, the Trial Court stayed the case until a decision was reached in the

Beyer v. City of Marathon, 197 So. 3d 563 (Fla. 3d DCA 2013), which was then pending before this Court. Shands v. City of Marathon, 261 So. 3d 750, 752 (Fla. 3d DCA 2019) ("Shands II").

Once this Court upheld a summary judgment for the City in Beyer, 197 So.3d 563, the City moved for summary judgment in this case. Shands II, 261 So. 3d at 752.

Finding the facts of Beyer "indistinguishable from the instant case," the Trial Court entered summary judgment for the City. Shands II, 261 So. 3d at 752.

The Shands then appealed the summary judgment ruling. Shands II, 261 So. 3d at 752.

In Shands II, the Shands argued -- among other things -- that the Trial Court erred in following Beyer, 197 So. 3d 563, because Beyer applied the "'ad hoc' factual analysis" from Penn Central Transportation v. City of New York, 438 U.S. 104 (1978), and the Shands were instead asserting a taking under the test articulated in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). R. at 697-699. In response, the City argued this Court had already ruled upon the correct legal standard for the Shands' claims in

Shands I and that the Trial Court had been obligated to apply the test articulated in Penn Central to the Shands' claims. R. at 728-730. The Court rejected the Shands' argument finding that the Trial Court had applied the proper analysis to the Shands' claim. See Shands II, 261 So. 3d at 753.

Nonetheless, the Court reversed the Trial Court's order granting summary judgment, finding that, unlike in Beyer, the record "contain[ed] no valuation of the ROGO points" and therefore the case was no indistinguishable from Beyer. Shands II, 261 So. 3d at 753.

Following remand, the Shands filed a motion for partial summary judgment on July 8, 2020, arguing that the Trial Court should grant summary judgment as to liability and find that a taking occurred under Lucas, because "the City took all economic use of the Shands' property." R. at 135.

The City filed its opposition to the motion for partial summary judgment on July 24, 2020. R. at 580-594.

The Trial Court conducted a hearing on the motion for partial summary judgment on July 29, 2020. R. at 754.

On September 28, 2020, the Trial Court denied the Shands' motion for partial summary judgment. R. at 779-781. The Trial Court found (1) that Shands I and Shands II already decided that the case should be decided under Penn Central and (2) that genuine issues of material fact existed. Id.

On May 24, 2021, and May 25, 2021, the Trial Court conducted a bench trial on the liability portion of the Shands' taking claim. R. at 1167-1170.

On August 31, 2021, the Trial Court entered final judgment in favor of the City. R. at 1222-1247.

On September 29, 2021, the Shands filed a notice of appealing (1) the Order of the Trial Court denying the Shands' motion for partial summary judgment entered on September 16, 2020, and (2) the Final Judgment entered on August 31, 2021. R. at 1265-1296.

SUMMARY OF ARGUMENT

The Court should affirm the Final Judgment entered in favor of the City following the two-day bench trial. First, the Trial Court properly denied the Shands' motion for partial summary judgment. In two prior appeals, this Court rejected the Shands' efforts to proceed under Lucas and found that their claim should proceed under Penn Central. Moreover, even if it were appropriate to analyze the Shands' claim under Lucas, summary judgment was still improper because the Property retained significant value even after the alleged taking where a market existed both for BPAS points and for the purchase of undeveloped offshore islands for personal use.

Second, the Trial Court correctly entered Final Judgment in favor of the City following trial. The Trial Court reviewed the relevant evidence and then employed the Penn Central analysis utilized by this Court in Collins and Beyer, two factually similar cases involving alleged takings of vacant land in Monroe County. Based on this analysis, the Trial Court correctly entered judgment in favor of the City because the Property retained significant value after the alleged taking and the Shands were unable to establish any reasonable,

investment-backed expectations. The Shands have provided no legitimate basis to reverse and indeed fail to address the dispositive prior decision of this Court.

ARGUMENT

I. The Trial Court Correctly Denied the Shands' Motion for Partial Summary Judgment

A. Standard of Review

The "standard of review of an order granting summary judgment is de novo." Ottey v. Citizens Prop. Ins. Corp., 299 So. 3d 500, 501 (Fla. 3d DCA 2020). Courts "review the record to determine whether there are genuine issues of material fact that preclude summary judgment." Id. (quotations omitted).

B. The Plaintiffs' Lucas-style Taking Claim Was Rejected by this Court in Two Prior Appeals

In challenging the denial of their Motion for Partial Summary Judgment, the Plaintiffs argue that the Trial Court erred in concluding that this Court previously rejected their Lucas-style taking claim. Br. at 22-25. The Plaintiffs claim that the Trial Court's "conclusion misread[] both Shands I and Lucas" and that "[t]he Shands' 'as-applied' takings claims referred to include both the

as-applied categorical (Lucas) claims, and the as-applied ad hoc (Penn Central) claims." Br. at 22.

Shands' contention that this Court did not previously hold that they could not assert a claim under Lucas and, instead, could only proceed under Penn Central cannot be reconciled with the language of Shands I and Shands II. In Shands I, the Court ruled on the correct legal standard for the Shands' claims and rejected Shands' attempt to assert a Lucas-style claim. There, this Court found that the Shands were asserting "an as-applied taking" claim and held that "[t]he standard of proof for an as-applied taking is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations[,]" which "requires a 'fact-intensive inquiry of [the] impact of the regulation on the economic viability of the landowner's property by analyzing permissible uses before and after enactment of the regulation.'" 999 So. 2d at 725, 723 (quoting City of Riviera Beach v. Shillingburg, 659 So. 2d 1174, 1174 n.1 (Fla. 4th DCA 1995), and citing Penn Central, 438 U.S. 104).

This Court then rejected the Shands' attempt to assert a Lucas-style taking, finding that the Shands could not state a Lucas-style

taking because "the mere enactment of the ordinances at issue did not eliminate all economically beneficial use of the property." Shands I, 999 So. 2d at 724 (citing Lucas). This, this Court clearly held that the Shands could only proceed under Penn Central.

The Shands argue that Shands I did not address whether they could assert a Lucas-style taking and that the statements in Shands I were all made in the context of addressing whether the Shands "were [ ] asserting 'facial' takings claims (of either variety)." Br. at 24, at 24 n13. The deficiency in theses arguments is that the Court in Shands I expressly defined what it meant by "facial" taking. In a footnote, the Court explained that, "following the usage made by the parties," "the term refer[ed] to a categorical, per se, taking, as used in Lucas." Shands I, 999 So. 2d at 722. Thus, this Court made clear that when it stated that the Shands' "cause of action for inverse condemnation d[id] not state a categorical, facial takings claim," it was referring to a Lucas-style claim. Id. at 725.

Not only did Shands I clearly and unequivocally reject a Lucas-style taking claim, but this Court rejected the precise argument being advanced by the Shands here in Shands II. There, the Shands

appealed the Trial Court's order granting of summary judgment in favor of the City based upon Beyer, another taking case involving an uninhabited, offshore island in the City. Shands II, 261 So. 3d at 752. One of the arguments advanced by the Shands in Shands II was that the Trial Court erred in following Beyer because it applied the "'ad hoc' factual analysis" from Penn Central, and the Shands were instead asserting a taking under the test articulated in Lucas. See R. at 697-699. In response, the City argued that this Court had already ruled upon the correct legal standard in Shands I thus requiring the Trial Court to apply the test articulated in Penn Central to the Shands' claims. R. at 728-731.

This Court then (again) rejected the Shands' argument. Shands II, 261 So. 3d at 753 ("The Shands argue the trial court improperly granted summary judgment for the City because the regulations at issue constituted a facial, categorical taking of their property."). Citing Shands I, this Court noted that it had "characterized the Shands' claim as being 'as applied' and not 'facial'" and that the Trial Court "therefore properly treated this case as an 'as applied' challenge." Id. This Court's use of the terms "facial,"

"categorical," and "as applied" mirrored the use of the terms in Shands I. Id.

Lest there be any uncertainty about the import of this Court's prior rulings, the reason the Court reversed in Shands II was because the record was devoid of any evidence of the value of the Property's "ROGO points." Id. at 753. Such a valuation is only relevant in applying the Penn Central analysis. See Beyer, 197 So. 3d at 566–67 (nothing that $150,000 value of the ROGO points "reasonably me[t] the Beyers' economic expectations…"). Thus, it is clear that the Court has already twice determined that the Shands' claims should be analyzed under Penn Central.

C. The Law of the Case Doctrine Requires The Court to Apply Penn Central to the Shands' Claim

Because this Court -- in two prior appeals -- addressed and rejected the precise argument now being advanced by the Shands, the law of the case doctrine obligates this Court to apply the prior rulings and analyze this case under Penn Central. The Court has explained the law of the case doctrine as follows:

> The law of the case doctrine applies where successive appeals are taken in the same case. It provides that

> questions of law decided on appeal to a court of ultimate resort must govern the case **in the same court and the trial court**, through all subsequent stages of the proceedings.
>
> Pursuant to the law of the case doctrine, a lower court cannot change the law of the case as established by the highest court hearing the case, and a trial court must follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case. **And, although an appellate court has the power to change the law of the case established in its prior decision where adherence to the rule would result in a manifest injustice a question of law decided on appeal will seldom be reconsidered or reversed, even when it appears to have been erroneous.**

United Auto. Ins. Co. v. Comprehensive Health Ctr., 173 So. 3d 1061, 1063 (Fla. 3d DCA 2015) (internal citations and quotations omitted) (emphasis added); see also Dougherty v. City of Miami, 23 So. 3d 156, 158 (Fla. 3d DCA 2009) (noting that "[t]he only exception to this doctrine is … that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice' ") (citation omitted).

The doctrine applies to issues explicitly ruled upon by the court, and to "those issues which were implicitly addressed or necessarily

considered by the appellate court's decision." Specialty Rests. Corp v. Elliott, 924 So. 2d 834, 837 (Fla. 2d DCA 2005).

Thus, under the doctrine, the Court should apply its prior rulings on the proper standard to be applied to the Shands' taking claims. In tacitly asking this Court to reverse its prior rulings, the Shands do not address the law of the case doctrine or argue the existence of a "manifest injustice." See Br. This deficiency alone warrants rejection of the Shands' argument. Dougherty, 23 So. 3d at 158 (applying law of the case doctrine to prior appellate decision given that the "respondents have not argued manifest injustice.").

Instead, the Shands contend that the Court should reverse the two prior rulings that the case should proceed under Penn Central because the Court previously erred and now has the opportunity "to correct course and clean up any such imprecise language in earlier decisions." Br. at 25 n.13. This is not a legally sufficient basis to avoid application of the law of the case doctrine even if the Court had allegedly twice previously erred (it did not).

D. The Plaintiffs Have Provided an Incorrect Statement of the Standard for a Taking Under Lucas

In support of their argument related to Lucas, the Shands repeatedly argue that the Trial Court should have found a Lucas-style taking because the Property's "offshore island zoning absolutely prohibits any economically-sensible **use**," Br. at 25 (emphasis added), and repeatedly reference the elimination of any "use" throughout their Brief. Br. at 21, 25, 26, 28. This is not an accurate statement of the current state of the law under Lucas and its progeny.

The Supreme Court's post-Lucas opinions have demonstrated that value and not use is the determinative factor. In Lingle v. Chevron U.S.A. Inc., the Supreme Court made clear that "[i]n the Lucas context, ... the complete elimination of a property's **value** is the determinative factor." 544 U.S. 528, 539 (2005) (emphasis added). The Supreme Court emphasized that "the categorical rule in Lucas was carved out for the 'extraordinary case' in which a regulation permanently deprives property of **all value**." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S.

302, 332 (2002) (emphasis added). "Anything less than a 'complete elimination of value,' or a 'total loss' … would require the kind of analysis applied in Penn Central." Id. at 330 (quoting Lucas, 505 U.S. at 1019 n.8); Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610, 628 (9th Cir. 2020) ("there is no Lucas liability for this less than total deprivation of value.").

Although value is determinative, use is still relevant under certain circumstances. See Murr v. Wisconsin, 137 S. Ct. 1933, 1949 (2017) (concluding that the challenged regulations did not deprive the landowners of all economically beneficial use because "[t]hey can use the property for residential purposes" and "[t]he property has not lost all economic value"). Finally, a token interest will not defeat a Lucas claim. See Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.").

E. The Property Retained Significant Value After the Alleged Taking

Even if it were appropriate for the Court consider a Lucas-style taking on appeal (it is not), evidence presented at trial established that the Property retained significant value so as to defeat such a claim. 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. In forming his opinion, Marr utilized the comparable sales approach where he identified actual 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. Based on this analysis, Marr opinion (1) that the market value of the Property in 2007 when sold for personal use -- i.e. camping -- was between $46,000 to $60,000, 5-25-21, Trial Trans. at 131-134, and (2) 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.

Citing to Lost Tree Village Corporation v. United States, 787 F.3d 1111 (Fed. Cir. 2015), the Shands argue that "the mere

possibility that someone might have been willing to buy Shands Key for ROGO/BPAS points is not relevant to the categorical (Lucas) inquiry." Br. at 30. Several problems exist with this argument.

First, Marr's opinion was not limited to the market value when sold for BPAS points. Instead, one of Marr's opinion was the value of the Property when sold for "personal use" such as "camping." 5-25-21, Trial Trans. at 131.

Second, Marr's opinion was not based upon some hypothetical "mere possibility" of a sale. Instead, in formulating his opinions, Marr identified actual sales of similar properties either for personal use or as BPAS points. 5-25-21, Trial Trans. at 131-133; 5-25-21, Trial Trans. at 130.

Third, realizing the value of the BPAS points associated with the Property would not necessarily require the sale of the Property. A individual seeking additional BPAS point could purchase them from the Shands, and the Shands could retain title to the Property and continue to use it for personal use. 5-25-21, Trial Trans. at 80-81, 84085, 86-87, 94.

Allowing the Shands to extract such value from the Property while retaining fee simple ownership is not the "de minimis," "token," or "speculative" value found problematic in Lost Tree. Based on the foregoing, the judgment in favor of the City should be affirmed even if the Court were to analyze the claim under Lucas.

II. The Trial Court Correctly Entered Final Judgment in Favor of the City Finding that No Taking Occurred

A. Standard of Review

"When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence. ... However, where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is de novo." Jasser v. Saadeh, 91 So. 3d 883, 884 (Fla. 4th DCA 2012) (alteration in original) (quoting Acoustic Innovations, Inc. v. Schafer, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008))

B. The Penn Central Factors

In a series of opinions, this Court 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); see Shands II, 261 So. 3d 750; Beyer, 197 So. 3d 563. The standard for evaluating as-applied claims originates from the Supreme Court's decision in Penn Central.

"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).

C. In Certain Situations, a Single Factor Can Be Dispositive Under Penn Central

The Shands' effort to reverse the Trial Court's Final Judgment is based upon a false legal premise. They repeatedly argue that "Penn Central does not establish a 'one-strike-you're-out' checklist;

it requires a balancing in which all three factors are considered." Br. at 47; Br. at 33, 34 ("No factor is dispositive, no factor is ignored."). At least two problems exist with the Shands' argument.

First, the Trial Court below did not simply rely upon a single factor as being dispositive. Instead, the Trial Court focused on both the lack of investment backed expectations and the retained value of the Property in rejecting the taking claim. R. at 1236-1238.

Such an approach is consistent with cases from this Court. In both Collins and Beyer, the Court focused on only two of the factors: the lack of investment backed expectations and the retained value of the subject properties. See Collins, 118 So. 3d at 874, 876 (noting "development value" and lack of "meaningful steps toward the development of th[e] respective properties"); Beyer, 197 So. 3d at 566-567 (noting "no evidence of investment-backed expectations" and "[t]he award of ROGO points, coupled with the current recreational uses allowed on the property."). Therefore, even if the Shands' argument was correct (it is not), it would not provide a basis for the Court to reverse since the Trial Court reviewed two of the factors.

Second, the Shands' argument is not supported by state and federal law. "While evaluation of the Penn Central factors 'is essentially an ad hoc, factual inquiry,' it is possible for a single factor to have such force that it disposes of the whole takings claim." Mehaffy v. United States, 499 F. App'x 18, 22 (Fed. Cir. 2012) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (internal citation omitted); see also Norman v. United States, 429 F.3d 1081, 1094 (Fed.Cir.2005) (noting that the absence of a single Penn Central factor can be dispositive); Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (affirming a grant of summary judgment for the government solely on the lack of reasonable investment-backed expectations); Golden Pac. Bancorp v. United States, 15 F.3d 1066, 1074 (Fed.Cir.1994) (concluding the absence of reasonable investment-backed expectations disposed of the takings claim).

None of the cases cited by the Shands provide that a court must consider all three factors in rejecting a taking a claim. The Shands cite Lingle for the proposition that "[a] total absence of evidence of one factor is not conclusive, and a taking may still be found if the

other factors show the regulation 'may be so onerous that its effect is tantamount to a direct appropriation or ouster.'" Br. at 33-34 (quoting Lingle, 544 U.S. at 528). However, the entire sentence from Lingle, which came from the opinion's syllabus, merely stated the general proposition that "the Court recognized that government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster." See Lingle, 544 U.S. at 528.

In Palazzolo, Justice O'Connor -- in her concurring opinion -- merely cautioned against having a lack of "[i]nvestment-backed expectations" be "talismanic under Penn Central" and noted that "[e]valuation of the degree of interference with investment-backed expectations instead [wa]s one factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" Palazzolo, 533 U.S. at 634 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). In Palazzolo, the majority had rejected a "blanket rule" that one who takes title to a property after the allegedly confiscatory regulation is put in place (and therefore lacks any reasonable investment backed

expectations) can never state a taking a claim. Id. at 628 ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.").

Finally, the Plaintiffs cite to Hodel v. Irving, 481 U.S. 704 (1987), wherein the Supreme Court invalidated a provision of the Indian Lands Consolidation Act of 1983 and ruled that the Act's escheat of small estates to the tribe required compensation to the Indian heirs under the Takings Clause. In engaging in the Penn Central analysis, the Supreme Court found that "[t]here [wa]s no question that the relative economic impact of § 207 upon the owners of these property rights c[ould] be **substantial**," but that "[t]he extent to which any of appellees' decedents had 'investment-backed expectations' in passing on the property [wa]s **dubious**." Hodel, 481 U.S. at 715 (emphasis added). Based on a weighing of just the first two facts, the Supreme Court noted that "might well find [the Act] constitutional," but that a consideration of the third fact -- the character of the government regulation -- established a taking given that the Act "amount[ed] to virtually the abrogation of the right to

pass on a certain type of property—the small undivided interest—to one's heirs." Id. at 716.

Thus, Lingle, Palazzolo, and Hodel do not stand for the proposition that a court must expressly consider each factor in the Penn Central analysis in rejecting a taking a claim lest the judgment be subject to reversal. Rather, they merely stand for the proposition that the ad hoc analysis involving the three factors from Penn Central must be based on the facts of the specific case. As recognized in Mehaffy, "it is possible for a single factor to have such force that it disposes of the whole takings claim." Mehaffy, 499 F. App'x at 22.

D. The Penn Central Factors Confirm the Absence of a Taking

As previously explained, the Penn Central factors include: "(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." Gluesenkamp, 873 So.2d at 467; see Ocean Palm Golf Club P'ship, 139 So. 3d at 473. Based on an application of the relevant

factors to the facts of this case, the Trial Court correctly found that no taking occurred.

1. The Property Retained Significant Fair Market Value After the Alleged Taking

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." Walcek v. United States, 49 Fed. Cl. 248, 258, 266 (2001), aff'd, 303 F.3d 1349 (Fed. Cir. 2002). 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, 49 Fed. Cl. at 258, 266 (2001) (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)); Maritrans Inc. v. United States, 342 F.3d 1344, 1354 (Fed. Cir. 2003) ("[T]he owner's

opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.").

"[I]f a party were able to recoup its investment after the government action, it is less likely that a taking has occurred." Cane Tennessee, Inc. v. United States, 57 Fed. Cl. 115, 124, on reconsideration in part, 62 Fed. Cl. 481 (2003) (citing Walcek, 303 F.3d at 1357).

Moreover, "in 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. (emphasis added).

The Trial Court correctly found that the first factor weighed in favor of finding that no taking occurred since the Shands where able to recoup the entirety of their basis or investment in the Property.

As a threshold matter, the evidence demonstrated that the Shands' basis or investment in the Property was zero given that the Property was gifted to them in 1984 and neither they nor their immediate predecessor in interest engaged in any capital projects during their ownership.

Even taking into account the Father's initial investment, the evidence confirmed that the Shands remained 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 demonstrated that the Property could be sold for use as BPAS points for $147,000, a sixfold increase on the initial investment. Given that the Shands were able to recoup their investment in the Property, the first factor weighed 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)); see also Pulte Home Corp. v. Montgomery Cnty., Maryland, 909 F.3d 685, 696 (4th Cir. 2018) (finding that no taking occurred under Penn Central where the property owner "also remain[ed] free to sell its unused TDRs to another developer for use in another location, allowing it to recoup at least some portion of its twelve million dollar TDR investment."); Brace v. United States, 72 Fed. Cl. 337, 357 (2006), aff'd, 250 F. App'x 359 (Fed. Cir. 2007) ("Also supporting this conclusion is the fact that the evidence suggests that, even with the Consent Decree, Mr. Brace could recoup his investment in the twin farms (at least plaintiff did not show otherwise).").

On appeal, the Shands contend that the Trial Court's "conclusion doesn't even pencil out because it" it did not "adjust[] for inflation." Br. at 43-44. The Shands' make this argument without citing to any legal support for the proposition that the Trial Court should have accounted for inflation. To the contrary, this argument has been expressly rejected by courts addressing this specific issue. See Walcek, 49 Fed. Cl. at 266 (holding that "**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.") (emphasis added). As such, the Trial Court's analysis was supported by the law.

2. The Shands Had No Investment-Backed Expectations

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 I, 999 So. 2d at 725, 723.

In the first appeal in this case, this Court recognized the Shands' likely lack of reasonable investment-backed expectations. As to this factor, the Court 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).

At trial, the evidence confirmed the Shands' lack of investment-backed expectations. The Shands 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 Shands 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 Trial Court properly concluded that the Shands could not establish any investment-backed expectations.

The lack of reasonable investment-backed expectations in this case is evident when the Shands' conduct is 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 case from this Court addressing a 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, this Court found the trial court erred in its determination that Galleon Bay had not established a taking. Id. at 569.

In this case, the evidence at trial demonstrated that the Shands were not able to establish reasonable investment-backed expectations similar to those established in Galleon Bay. The Shands failed to present any evidence of actual dollar amounts expended toward development of the Property. See 5-24-21, Trial Trans. at 60-68.

The Trial Court also properly found Rodney Shands' periodic trips to the Property did not alter the analysis. R, at 124301244,

Although Rodney Shands visited the Property multiple times between 1972 and 2004, such visits did not create reasonable investment backed expectations. These trips -- often combined with personal vacations -- simply do not amount to meaningful steps to develop the Property. Although 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 develop the Property, the Shands cannot establish reasonable investment-backed expectations.

3. The Trial Court's Ruling Was Consistent with Opinions from this Court

The Trial Court's finding that no taking had occurred aligned with cases from this Court that addressed taking claims under similar circumstances where the property owners -- like the Shands -- were longtime owners of undeveloped property in the Florida Keys yet failed to pursue any development opportunities over decades of

ownership. First, in Collins, the Court 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 Court 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.

The Court 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.

Then, in Beyer, the Court addressed an as-applied taking claim involving -- just like the property here -- an undeveloped offshore island located in the City. 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.

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.

This Court affirmed the trial court's finding that no taking occurred under Penn Central 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. 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.

Additionally, the Court 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.[3]

Here, the Trial Court correctly found that the evidence presented at trial was indistinguishable from the evidence in Collins and Beyers. Just like the plaintiffs in those cases, the Shands 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,

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[3] In both Collins and Beyer, the Court 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).

neither the Shands nor their Mother 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 Shands could not establish any reasonable investment backed expectations. See also 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.").

In addition, just like the plaintiff in Beyer, the evidence at trial established that the Shands' Property was left with reasonable value and uses. According to the City's expert appraiser, Trent 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.").

The Trial Court reliance upon Beyer was particularly appropriate given the factual similarities of Beyer and this case. 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, this Court found no taking. This case involved a 7.91-acre undeveloped offshore island also located in this City and that was owned by the same family since the 1950s. Just as with the Beyers, the Shands 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).

Beyer and this case are indistinguishable and, just as in Beyers, the Trial Court properly found no taking occurred.

E. None of the Arguments Raised By the Shands Provide a Basis to Reverse the Trial Court's Finding Under Penn Central

In challenging the Trial Court's finding that no taking occurred under Penn Central, the Shands advance three arguments. First, the Shands claim that the Trial Court erred when it rejected the testimony of their appraiser because his testimony was the only evidence of a "before" valuation of the Property. Br. at 35-39. Second, the Shands argue that the Trial Court improperly "concluded the Shands lacked 'any' investment-backed expectations of residential use, even though their purchases were backed by three decades of residential zoning." Br. at 39 (capitalization altered). Third, the Shands claims that the Trial Court committed reversible error by not expressly considering the third factor stated in Penn Central. Br. at 47-49. None of the arguments provide a valid basis to reverse.

1. The Shands Ignore Binding Authority from this Court

Conspicuously absent from the Shands' arguments regarding the Penn Central analysis is any attempt to distinguish their claims from those rejected by this Court in Collins and Beyer.[4] Collins and Beyer are binding precedent from this Court, which the Trial Court was obligated to apply. Given the factual similarities between this case and Collins and Beyer, the Shands' refusal to address these decisions or to explain how they were not applicable is fatal to their appeal.

Moreover, while the Shands reference the prior appeals in this case, they ignore key language from those decision, including, specifically, this Court's recognition of 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. Collins, Beyer, Shands I and Shands II tacitly reject

[4] The Shands also fail to analogize their claims to the claim found successful in Galleon Bay.

the arguments being advanced by the Shands in this appeal. The Shands' decision to ignore these precedents requires the Court to reject their arguments and affirm the Trial Court's Final Judgment.

2. The Trial Court Engaged in a Judicially-Recognized Analysis of the Economic Impact Prong of Penn Central

The Shands complain that the Trial Court erred in its analysis of the Penn Central economic impact prong when it rejected the testimony of the Shands' expert. Br. at 35-39. The Shands' arguments are without merit.

First, the Trial Court engaged in the precise analysis employed by this Court in Collins and Beyer. Just like this Court in Collins and Beyer, the Trial Court focused on both on the lack of investment backed expectations and the retained value of the Property in rejecting the taking claim. R. at 1236-1238. Collins and Beyer are binding precedent from this Court and were key to the Trial Court's ruling. These decisions -- which go unaddressed by the Shands -- confirm that the Trial Court's Final Judgment should be affirmed.

Second, the Trial Court also employed a legally recognized approach to evaluating the economic impact of a regulation by

considering the Shands' ability to recoup their investment in the Property. This approach has been employed by multiple federal appellate courts applying the Penn Central analysis and the Shands do not legitimately argue that it is not an appropriate analysis. See Walcek, 49 Fed. Cl. at 258, 266; Florida Rock Indus., Inc., 791 F.2d at 905; Maritrans, 342 F.3d at 1354; Cane Tennessee, 57 Fed. Cl. at 124; Pulte Home Corp., 909 F.3d at 696; Brace, 72 Fed. Cl. at 357.

Instead, the Shands claim that the Trial Court must also have engaged in a before and after analysis of value. Br. at 35-36. However, this Court did not engage in any such analysis in rejecting takings claim in Collins and Beyer. Instead, in both cases, the Court focused -- like the Trial Court below -- on the lack of investment-backed expectations and the retained value of the subject properties.

Moreover, Penn Central requires an "ad hoc" analysis based upon the specific facts of each case. In certain factual situations, a single Penn Central factor (in this case two) may be dispositive. Ruckelshaus, 467 U.S. at 1005; Norman, 429 F.3d at 1094; Mehaffy, 499 F. App'x at 22. Here, the Trial Court analyzed the most

appropriate Penn Central factors based upon this Court's direction in Collins and Beyer and the reliable evidence presented at trial.

The Shands argue the Trial Court committed fundamental legal error by rejecting as the testimony of its expert, Robert Gallaher, as being not relevant. Br. at 36. This argument is not supported by the Trial Court's ruling or the law.

First, the Trial Court found that Gallaher's opinion -- which focused on the Property's February 2007 value assuming it could be improved with one residence -- was not relevant given its analysis. As contemplated by Collins and Beyers, the Trial Court was analyzing the retained value of the Property. R. at 1234. Gallagher's opinion regarding a hypothetical value assuming the right to build one residence on the Property was simply not relevant in determining the retained fair market value of the Property in 2007 under the existing regulations.

Second, the Trial Court also found that Gallaher's opinion as "unreliable." R. at 1234-1235. Gallaher utilized the extraction method in formulating his opinion whereby he identified the sales of developed offshore islands or waterfront lots and then attempted to

extract the value of the improvements to determine the value of the undeveloped Property with the hypothetical right to build a home. 5-24-21, Trial Trans. at 156-158. As the Trial Court correctly recognized, many of Gallaher's assumptions were simply unreliable. For example, Gallaher used contracts for sales that never closed as opposed to using (like the City's expert) actual sales. Id. at 181. Gallagher used some developed mainland lots to come up with the price per square foot for purposes of extraction as opposed to offshore lots like the one at issue here. Id. at 189-190. Gallaher also used the sales of developed offshores island that included either a bridge to the island or an associated dock lot to be used in accessing the island. Id. at 182-184. Given that the Property was an island with neither a bridge nor a dock lot, mainland lots and offshores islands with bridges or dock lots were poor comparators.

Finally, the Shands argue that the Trial Court should have relied upon Gallaher's opinion as it was "the sole evidence of Shands Key's value immediately before the City downzoned it." Br. at 38. This characterization of Gallaher's testimony is inaccurate. Gallagher did not opine on the value of the Property "immediately

before the City downzoned it," which occurred in 1986. Instead, Gallaher opined on the value of the Property in February 2007 assuming the right to build a residence, a state of affairs that had not existed for more than two decades and was clear on the face of the regulations adopted in 1986. 5-24-21, Trial Trans. at 156-157. Given these issues, the Trial Court was not obligated to rely upon testimony that it found unreliable.

3. Merely Purchasing Property Does Not Establish Investment-Backed Expectations

In challenging the Trial Court's finding that they had few if any reasonable investment-backed expectations, the Shands advance three arguments, claiming (1) that "the court should have considered evidence of the Shands' expectations of use, and the law backing up their expectations as reasonable" (2) that "the court should not have focused on whether the Shands expected to 'recoup' their investment…," and (3) that "the circuit court should not have equated investment-backed expectations with the entirely separate question whether the Shands 'vested' their right to develop under Florida property law." Br. at 39-40. The Shands' arguments misstate both

the law and the Trial Court's ruling and ignore (again) binding precedent from this Court.

As a threshold matter, the Shands' argument that "[t]he 'expectations' inquiry required the circuit court to consider the Shands' expectations of making use of their property, and then determine whether those expectations were 'distinct' or 'reasonable,'" is an incomplete description of the Penn Central inquiry. Br. at 39 (citing Penn Central, 438 U.S. at 124). They have omitted the phrase "investment-backed." Under Penn Central, not only must their expectations be reasonable and distinct, but they also must be investment-backed. It is the lack of any interference by the City with investment-backed expectations that was fatal to the Shands' claim.

The Shands accuse the Trial Court of improperly conflating the analysis of the economic impact and investment-backed expectations factors of Penn Central. See Br. at 39. Here, the Trial Court engaged in a separate analysis of the two prongs and, as to the investment-backed expectations, concluded that the lack of "evidence [demonstrating] 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" confirmed a lack of investment-backed expectations. R. at 1238.

The Trial Court's analysis was consistent with this Court's language in Shands I and analysis in Collins and Beyer. In Shands I, this Court recognized that, based on the allegations in the pleadings, "the Shands family's 'investment-backed expectations' were **minimal at best**." Shands, 999 So. 2d at 724–25 (emphasis added). Then, in Collins and Beyer, this Court looked at things like the property owner's effort to develop, the length of ownership, and the history of development regulations in evaluating the plaintiffs' lack of investment-backed expectations under Penn Central. Collins, 118 So. 3d at 876 n7; Beyer, 197 So. 3d at 565. The Trial Court correctly followed this Court's prior direction.

Essentially, the Shands argue that they have established investment-backed expectations because their father purchased Property and, at the time of the purchase, the Property could be developed. At least two problems exist with this argument. First, they have not cited a single case holding that the mere purchase of property alone creates sufficient investment-back expectations for

purposes of Penn Central. Indeed, such a blanket rule would be illogical because it would mean that the investment-backed expectations factor would weigh in favor of every purchaser of property regardless of whether the purchaser made significant efforts to develop the property or whether the purchaser, like the Shands, made zero efforts to develop the property. No case supports this proposition.[5]

Second, the Shands' argument is inconsistent with opinions from this Court. Shands I, Collins, Beyer, and Galleon Bay all directed the Trial Court to review the Shands' efforts to develop the Property over their decades of ownership in evaluating whether they had investment-backed expectations. As previously noted, the Shands have elected to not address these authorities.

Instead of addressing the applicable cases from this Court, the Shands cite broadly to opinions from the Supreme Court. Many of cases do not stand for the proposition claimed, and the quotations

[5] The Shands' reliance on this argument is even more attenuated because they did not invest anything in obtaining the Property. Rather, it was gifted to them from their Mother, who in turn inherited it from their father.

are taken out of context. For example, the Shands cite to Palazzolo and claim that "[t]o determine whether expectations are reasonable, the circuit court should have looked at 'common, shared understandings of permissible limitations derived from a State's legal tradition.'" Br. at 41 (quoting Palazzolo, 533 U.S. at 630). However, the quote from Palazzolo was not referring to investment-backed expectations under Penn Central. Instead, it was referring the appropriate standard under Lucas for "when a legislative enactment can be deemed a background principle of state law." Palazzolo, 533 U.S. 606, 629-630 (citing to Lucas).

Similarly, in Nollan v. California Coastal Commission, the Supreme Court addressed whether a government extraction in exchange for development approvals constituted a taking. 483 U.S. 825, 833 (1987). It was not addressing the appropriate analysis under Penn Central.

Finally, the quotation used by the Shands from Kaiser Aetna was referring to the "[t]he nature of the navigational servitude when invoked by the Government in condemnation cases." 444 U.S. at 178. It was not, as implied by the Shands, addressing the

investment-backed expectations prong of Penn Central. In the end, none of the Supreme Court decisions cited by the Shands support their specific arguments.

4. The Trial Court Was Not Required to Address the Character of the Government Action

The Shands argue that "[b]y not considering at all the character factor, the circuit court's ad hoc takings analysis was incomplete and the Judgment legally insufficient." Br. at 48. This argument is meritless.

As previously explained, in certain factual situations, a single Penn Central factor may be dispositive, meaning that it would be unnecessary to consider all three factors. Ruckelshaus, 467 U.S. at 1005; Norman, 429 F.3d at 1094; Mehaffy, 499 F. App'x at 22. Here, the Trial Court, following Collins and Beyer, considered the two most significant factors.

Moreover, the Shands' claim that the Property "remains vacant, idle, and devoid of economic uses" is simply not accurate. As found by the Trial Court, the Property retained a value of between $46,000 to $60,000 when sold when sold for "personal use" such as

"camping," and the value of the BPAS at sale was $147,000. And the sale of the latter would not necessarily require the sale of the Property. 5-25-21, Trial Trans. at 80-81, 84-87, 94. Such values do not leave a property devoid of economic uses.

CONCLUSION

The Court should affirm the order denying their motion for partial summary judgment entered on September 16, 2020, and the Final Judgment entered on August 31, 2021,

CERTIFICATE OF COMPLIANCE

The Appellee certifies that size and style of type used in this brief are Bookman Old Style Size 14 Font and that the brief contains 12,329 words.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to those listed on the attached Service List on this 5th day of July, 2022 via E-mail.

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