No. 22-2242

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LEMON BAY COVE, LLC

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA

Defendant-Appellee

APPELLANT, LEMON BAY COVE, LLC'S CORRECTED FIRST AMENDED INITIAL BRIEF

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March 15, 2023

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	22-2242
Short Case Caption	Lemon Bay Cove, LLC v. U.S.A.
Filing Party/Entity	Lemon Bay Cove, LLC

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 3/15/2023

Signature: /David Smolker/

Name: David Smolker

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Lemon Bay Cove, LLC	Heinz Brunner (Shareholder in I.H.T Corporation) Lenon Bay Cove, LLC)	
	I.H.T. Corporation (shareholder in Lemon Bay Cove, LLC	
	TSCK LLC (shareholder in Lemon Bay Cove, LLC)	
	Thomas Brunner (shareholder in TSCK LLC)	
	Real Investment Company LLC (shareholder in Lemon Bay Cove, LLC	
	Dominik & Hildegard Goertz (shareholders in Real Investment Company, LLC)	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☑ Additional pages attached

Jeffrey H. Wood	Frank Singer	Claudia Antonacci Hadjigeorgiou
Allison C. Doucette	Jean A. Williams	Pacific Legal Foundation
Bartlett, Loeb Hinds and Thompson, PLLC (f/k/a Smolker Bartlett, Loeb Hinds and Thompson, P.A.)	Haley Carpenter	David J. Dearson

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

4. **Additional Legal Representatives**

Tyler L. Burgess

Daniel Pinkston

Jacqueline Brown

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STATEMENT OF RELATED CASES

No appeals from the same civil action were previously before this Court or any other appellate court. Undersigned counsel is not aware of any pending related cases within the meaning of Federal Circuit Rule 47.5.

STATEMENT OF JURISDICTION

Lemon Bay Cove, LLC ("Lemon Bay") sued the United States (the "Government") claiming a regulatory taking of its property in violation of the Just Compensation Clause of the Fifth Amendment. The Court of Federal Claims had jurisdiction under 28 U.S.C. § 1491(a)(1), and it entered a Post-Trial Opinion on July 15, 2022. Appx1. Lemon Bay filed a timely notice of appeal on September 13, 2022. *See* Fed. R. App. P. 4(a)(1)(B). Appx3102. This Court has jurisdiction under 28 U.S.C. §1295(a)(3).

STATEMENT OF THE ISSUES

Lemon Bay presents the following issues on appeal:

1. Did the Trial Court erroneously conclude the United States Army Corps of Engineers' (the "Corps'") denial of Lemon Bay's wetland permit did not constitute a categorical taking of Lemon Bay's land and of its vested proprietary rights to bulkhead and fill in the land under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)?

2. Alternatively, did the Trial Court erroneously conclude that the Corps denial

of Lemon Bay's wetland permit did not constitute a taking of Lemon Bay's land and its vested proprietary right to bulkhead and fill in the land under *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978)?

3. Does Lemon Bay's alleged ability to transfer and sell Transferable Density Units qualify an economic use for takings analysis purposes where there was no testimony or evidence that such ability actually enhances the value of Lemon Bay's land and rights?

4. Does the Corps denial of Lemon Bay's wetland permit amount to a separate taking of Plaintiff's special statutory riparian right to bulkhead and fill its land?

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

This case involves Lemon Bay's Fifth Amendment regulatory taking claims seeking just compensation for the taking of its land and the vested statutory right to bulkhead and fill in the land under: (1) *Lucas*, 505 U.S. 1003 (deprivation of all economically beneficial or productive use); or alternatively (2) *Penn Central*, 438 U.S. 104. The taking claims arise from the "Corps" denial of Lemon Bay's wetland fill permit application under the section 404 of the federal Clean Water Act. See, 33 U.S.C § 1344 & 40 C.F.R § 230.10.

A. Categorical Taking - *Lucas*

The Fifth Amendment states "private property [shall not] be taken for public

use, without just compensation." *U.S. Const. Am. V.* While the United States Supreme Court "has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government," the Supreme Court in *Lucas*, 505 U.S. 1003, carved out a special category of regulatory taking "requir[ing] just compensation "without case-specific inquiry into the public interest advanced in support of the restraint' [] and 'without consideration of the landowner's investment-backed expectations. *See Penn Central,* 438 U.S. at 123.

Posing the rhetorical question "[F]or what is the land but the profits thereof[?]," the Supreme Court held:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1018-19 (citing 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812)). This Court consistently holds that Corps wetland permit denials, having the effect of depriving the landowner of the economically beneficial use or value of their property, constitute *Lucas* takings. *Lost Tree Village Corp. v. U.S.*, 787 F.3d 1111, 1119 (Fed.Cir. 2015); *Palm Beach Isles Assocs. v. U.S.*, 231 F.3d 1354, 1357 (Fed.Cir. 2000); *Loveladies Harbor, Inc. v. U.S.,* 28 F.3d 1171, 1182 (Fed.Cir. 1994).

In determining a *Lucas* type taking the touchstone is "economically viable use" not residual value. *See Lost Tree*, 787 F.3d at 1116 (rejecting the government's argument that *Lucas* applies "only in the narrow circumstance in which all value, regardless of its source, has been lost"); *see also Resource Investments, Inc. v. U.S.*, 85 Fed. Cl. 447, 486 (2009) ("*Lucas* [] focuses on whether a regulation permits economically viable use of the property, not whether the property retains some value on paper…"); *Florida Rock Industr. v. U.S.*, 18 F.3d 1560, 1567 (Fed.Cir. 1994) (categorical taking turned on whether the parcel retained economically viable use, for which a change in market value was not a substitute but merely a measure of it); *Palm Beach Isles*, 231 F.3d 1354 (requiring "a sufficient denial of economically viable use" and citing *Florida Rock*, 18 F.3d at 1564–65; *Loveladies,* 28 F.3d at 1176–77, 1179–83 and *Creppel v. United States*, 41 F.3d 627, 631–32 (Fed. Cir. 1994)).

Applying this test, the Claims Court in *Lost Tree Village Corp*, 115 Fed. Cl. 219 (2014), found the Corps denial of a section 404 permit seeking to fill a 4.99 acre wetland parcel ("Plat 57") bordering a cove on the Indian River in east central Florida constituted a *Lucas per se* taking. *Id.* at 222. Like here, Plat 57 consisted of mangrove swamp and wetlands that have been disturbed by scattered upland spoil mounds and man-made mosquito ditches. *Id*. at 224. Like here, the owner sought to develop the parcel for single-family residential purposes. *Id*. And, like here, the

Corps denied the permit because less environmentally damaging alternatives were available. *Id*. The Claims Court held the permit denial constituted a *Lucas* taking because without a permit the property was "relegated to basically a wetland parcel with little or no economic use except at nominal levels…which typically does not support significant economic value…." *Id*. at 228. This Court affirmed on appeal in *Lost Tree*, 787 F.3d 1111 citing its decision in *Loveladies,* 28 F.3d at 1173, and concluding that *Lucas's per se* treatment is appropriate where remaining value is "de minimis," and a parcel is "deprived of all economically feasible use." *Id*. at 1181–82.

Similarly, in *Loveladies*, the Corps denied a section 404 permit to fill 11.5 acres of wetlands. Like here, the landowner previously received state environmental agency approval to fill the land and construct multiple single-family homes. *See Loveladies*, 28 F.3d at 1173-73. And like here, the remaining value of the wetlands was de minimus. *Id.* at 1181-82. This Court concluded that "this is a case in which the owner of the relevant parcel was deprived of all economically feasible use" amounting to "a total taking of the property owner's interest in these acres…" *Id.* at 1182.

Similarly, in *Palm Beach Isles*, 231 F.3d 1374, this Court found a *Lucas* taking of a 50.7 acre parcel consisting of 1.4 acres of uplands and 49.3 acres of submerged lands that, like here, carried with it the rights to bulkhead and fill. *Id.* at

1384. This Court concluded the Corps' permit denial constituted a *Lucas* taking because, as here, "without [a] dredge and fill permit" the property was left with "no or minimal value" and because, like here, "the property owner under state law had the right to dredge and fill [the submerged lands]." *Id.*

B. Regulatory Taking – *Penn Central*

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), the Supreme Court noted that regulation falling short of eliminating all economically beneficial use may constitute a taking under the Supreme Court's decision in *Penn Central*, 438 U.S. at 124. In *Penn Central*, the Court identified factors having "particular significance," namely: (1) "[t]he 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." *Id*.

C. Clean Water Act

The Corps denied Lemon Bays application for a wetland permit pursuant to the federal Clean Water Act which requires landowners to obtain permits from the Corps before discharging fill material into wetlands subject to federal jurisdiction. See 33 U.S.C. §1311(a), 33 U.S.C. §1344(a). Corps regulations require it to deny permits that violate guidelines codified at 40 C.F.R. pt. 230 ("404(b)(1) guidelines") including "if there is a practicable alternative ... which would have

less adverse impact on the aquatic ecosystem." 40 C.F.R. §230.10(a).

When a landowner proposes to fill wetlands for an activity that is not "water dependent," the Corps guidelines require it to presume that less environmentally damaging practicable alternatives are available "unless clearly demonstrated otherwise." 40 C.F.R. §230.10(a)(3); *see also Id.* §§230.3(q-1) and 230.41. If no practicable alternative exists, and wetland impacts have been minimized to the extent possible, the Corps may require the permittee to undertake "[c]ompensatory mitigation for unavoidable impacts." 33 C.F.R. §332.1(c)(2); *see also* 40 C.F.R.§230.10(d).

A development is "water dependent" when "the activity associated with a discharge which is proposed for a special aquatic site" requires "access or proximity to[,] or siting within[,] the special aquatic site in question to fulfill its basic purpose." 40 C.F.R. §230.10(a)(3). By practice, the Corps treats waterfront housing construction as a non-water dependent use. As the Corps interprets its guidelines, this presumption is nearly conclusive, and effectively requires landowners like Lemon Bay to acquire and seek to develop non-wetland sites while foregoing residential development of the waterfront property they already own and the exercise of the riparian rights appurtenant thereto.

D. Lemon Bay's Vested Statutory Bulkhead and Fill Rights Pursuant to Fla. Stat. §253.15

In 1954, the State of Florida Trustees of the Internal Improvement Trust Fund (the "Trustees") conveyed the Property's parent tract to Lemon Bay's predecessor pursuant to section 253.15, Florida Statutes (1953), which provided:

> In case any island or submerged lands are sold by the Trustees, according to the provisions of §§253.12 and 253.13, the purchaser shall have the right to bulkhead and fill in same, as provided by § 309.01, without, however, being required to connect the sale with the shore or with a permanent wharf.

Appx142-143. According to the Florida Supreme Court, these rights constitute vested proprietary "special" riparian rights to bulkhead and fill in the lands conveyed which rights were "clearly necessary[in] order to reclaim these lands and [turn] them into useful property." *Trustees of Internal Improvement Trust Fund v. Claughton*, 86 So.2d 775, 789 (Fla. 1956). In *Zabel v. Pinellas County Water & Navigation Authority*, 171 So. 2d 376, 380-81 (Fla. 1965), the Florida Supreme Court held these rights: (1) are appurtenant to and run with title to the lands sold; (2) are " presumptively valid…based on the determination by the Trustees that the public interest would not be impaired"; (3) are [the landowner's] only present rights attributable to ownership of the submerged land itself"; (4) constitute " 'property'…that includes the right to acquire, use and dispose of it for lawful purposes" and the constitution protects each of these essentials. Riparian rights constitute vested property that are appurtenant to and implicitly runs with the lands to which they relate and may not be taken without just compensation. *See Kendry*

v. State Road Dept., 213 So.2d 23, 27 (Fla. 4th DCA 1968); *see also Brickell v. Trammell*, 82 So.221, 227 (Fla. 1919). The United States Supreme Court has recognized the vested character of these types of rights. *See Appleby v. New York*, 271 U.S. 364, 399 (1926) (where city conveyed submerged lands with the right to fill and wharf them, "successor-in-interest vested with the fee simple title in the lots conveyed, and with a grant of wharfage at the ends of the lots on the river…and that the city can only be revested with that by a condemnation of the rights granted.").

E. Florida Environmental Resource Permit ("ERP") program pursuant to Fla. Stat. §373.4131

The State of Florida regulates wetlands under its Environmental Resource Permit ("ERP") program pursuant to Fla. Stat. §373.4131, which requires a permit for the dredging or filling of wetlands. Pursuant to Fla. Stat. §373.414(1), an ERP permit applicant must: (1) "demonstrat[e] that [a regulated] activity . . . will not be harmful to [] water resources or will not be inconsistent with the overall objectives of the district," (2) "provide reasonable assurance that state water quality standards . . . will not be violated[,]" and (3) provide "reasonable assurance that such activity in, on, or over surface waters or wetlands . . . is not contrary to the public interest." If an applicant cannot meet the criteria, the agency will consider any "measures proposed . . . to mitigate adverse effects that may be caused by the regulated activity" pursuant to Fla. Stat. §373.414(1)(b). The public interest test involves a

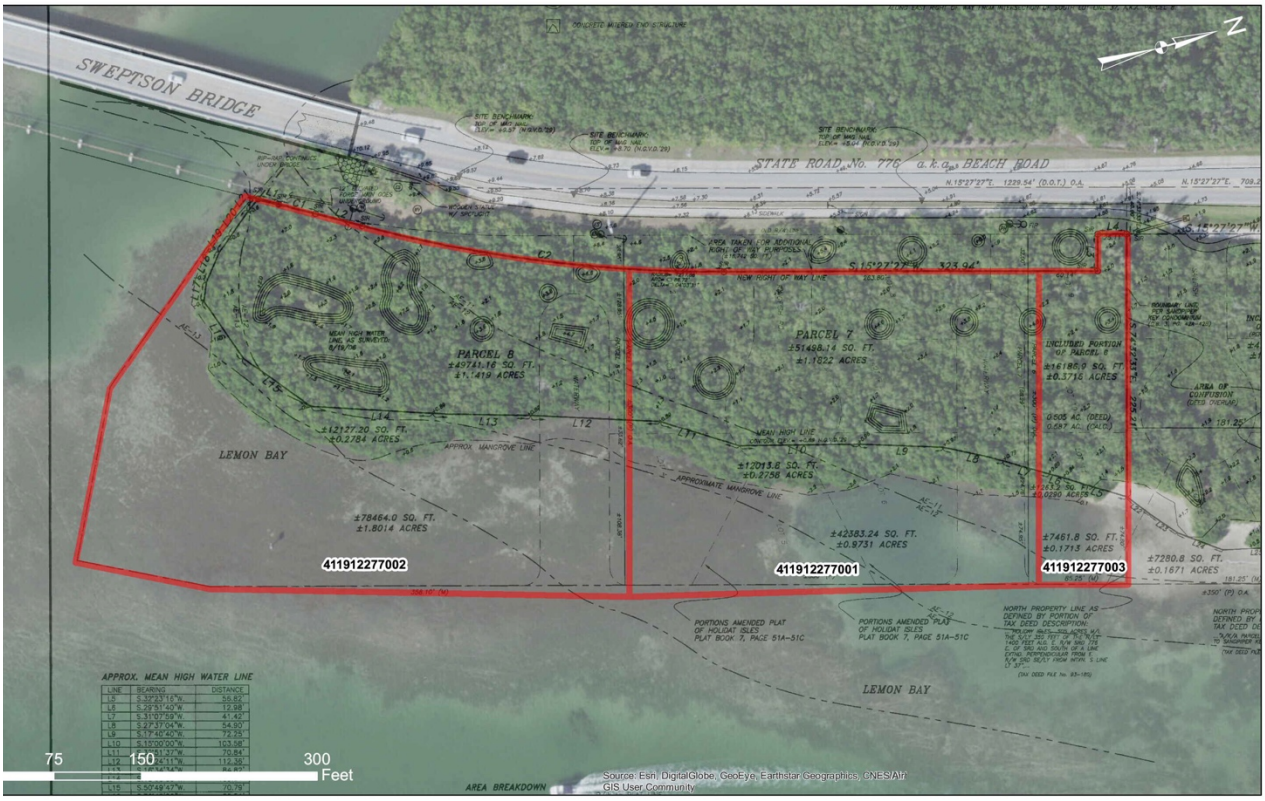
balancing of multiple criteria including whether the activity will adversely affect the conservation of fish and wildlife.

Where a person wishes to construct and maintain a private residential multi-family dock designed or used to moor three or more vessels within aquatic preserve, Fla. Stat. §253.77(1) and Fla. Admin. Code § 18-21.005(1)(d)(2) require a sovereignty submerged land lease from the Trustees. In evaluating requests for leases of state sovereignty lands a balancing test is utilized pursuant to Fla. Admin. Code §18-20.004(2) "to determine whether the social, economic and/or environmental benefits clearly exceed the costs." Notably, Fla. Admin. Code § 18-20.004(4)(a) states: "[n]one of the provisions of [Rule 18-20.004] shall be implemented in a manner that would unreasonably infringe upon the traditional, common law and statutory riparian rights of upland riparian property owners adjacent to sovereignty lands."

II. FACTUAL BACKGROUND

Lemon Bay owns 5.64 acres of privately-owned submerged lands, mangroves and scattered small, isolated upland spoil piles (the "Property"). Appx100. An aerial photo depicting the Property is set forth below. The Property is located on Sandpiper Key along Beach Road within unincorporated Charlotte County, Florida. The Property abuts and lies partially beneath the tidal waters of Lemon Bay to the west and south and Beach Road to the north.

Approximately 3.02 acres are mangroves. The remainder of the site is approximately 2.465 acres of submerged tidal bottoms, .005 acres of constructed beach and .15 acres of upland spoil mounds scattered under the mangrove canopy. Appx141.



As noted, the Property's parent tract consisted of State of Florida-owned sovereignty submerged lands sold by the State with the rights to bulkhead and fill in the lands. In 1961, Mr. Stanford received permits from the Corps and the Trustees to fill portions of the parent tract, including the Property. By 1970, the northwest portion of the parent tract had been filled, but the Property remained unfilled and undeveloped. Appx143. In 1980, Sandpiper Key Associates acquired

the parent tract and constructed a 79-unit condominium development on the previously filled portion leaving the Property undeveloped. Appx144. In August, 1993, Mr. Gerald LeFave purchased the Property from Charlotte County for $12,100 at a tax sale. In 2007, Mr. LeFave proposed a 39-unit condominium development. Appx144. This development avoided filling in 2.96 acres of the submerged portion of the Property. The development also would have required removing, bulkheading and filling in 2.68 acres of the Property's mangroves and constructing a boat ramp centrally located along the Property's waterfrontage. Appx144, Appx1071, Appx265.

At that time, the Property was, and it still is designated "MDR," Medium Density Residential under Charlotte County's Future Land Use Map and is zoned "MMF- 7.5," Manasota Multi-Family 7.5. The land use and zoning allow single and multi-family residential use at a density of up to 7.5 units per acre or, in the case of Property, a maximum of 42 units. Appx147. The Future Land Use Map is considered to be the land use constitution under Florida land use laws. *See Citrus County v. Halls River Development, Inc*., 8 So. 3d 413, 420 (Fla. 5th DCA 2009) ("A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality.")

In November 2007, Mr. LeFave obtained preliminary site plan approval

from Charlotte County authorities for his proposed development. In 2008, IHT Corporation ("IHT") loaned Mr. LeFave $750,000 secured by a mortgage on the Property. Mr. LeFave defaulted on the loan, and in June 2010, a Florida court granted a foreclosure judgment to IHT finding the total amount due to be $875,878.02. On September 3, 2010, IHT purchased the Property for a credit bid of $15,200 at the foreclosure sale. Appx145-146. In 2011, IHT, TSCK Investment, LLC and Real Investment, LLC, created Lemon Bay Cove, LLC, as a special purpose entity to develop the Property. IHT transferred the Property to Lemon Bay in November 2011 for $10. Appx146.

In early 2012, Lemon Bay began efforts to develop the Property intending to bulkhead and fill 1.95 acres of the 5.64-acre Property and construct a 12-unit townhome development. Appx148. The 2012 project reduced the proposed fill area by almost three-quarters of an acre as compared to the 2007 plan and proposed to preserve the most mature mangroves along the shore such that the fill would all be located above the mean high-water line. Appx1453-1454. The 2012 project also eliminated a boat ramp and the need to dredge a boat channel. Appx144, Appx148, Appx1071, Appx1480.

In February 2012, Lemon Bay applied to SWFWMD for the required ERP permit for the project. The ERP application included no docking facilities. In December 2012, SWFMD approved Lemon Bay's ERP, including Lemon Bay's

purchase of mangrove mitigation credits from the state and Corps approved Little Pine Island Mitigation Bank.

In April 2012, Lemon Bay filed an application with the Corps for a permit to construct the SWFWMD approved project pursuant to Section 404 of the Clean Water Act. The fill footprint was slightly revised to 2.08 acres.

In October 2012, the Corps informed Lemon Bay that, because the project was residential in character, it was not water dependent, and, therefore, the Corps presumed that less environmentally damaging practicable alternatives existed for Lemon Bay's development. Appx155. In other words, the Corps presumed for section 404 permitting purposes that Lemon Bay was required to acquire an alternative, non-wetland site and develop it residentially while foregoing development of the property it already owned. In an attempt to rebut the Corps' presumption, in December 2012, Lemon Bay submitted and later revised a "Practical Alternatives Narrative". Appx155. In February 2013, Lemon Bay amended its application to include a 13-slip boat dock to be located off the Property's southern edge, partially on state-owed sovereign lands. Appx155.

The permit review process continued for the next three years and ten months. During this period the Corps reviewed the application, solicited agency and public comment, consulted with the United States Fish and Wildlife Service ("USFWS"), the United States Environmental Protection Agency ("EPA"), and the

National Marine Fisheries Service ("NMFS"), made various requests of Lemon Bay for additional information, received and, months later, reviewed and responded to Lemon Bay's responses to the requests, visited the site and met several times with Lemon Bay's representatives. Appx7-8, Appx198, Appx202. The Corps concluded that inclusion of the dock raised new concerns regarding the West Indian manatee under the Endangered Species Act and the Marine Mammal Protection Act. Appx155-156. In order to comply with Charlotte County manatee protection guidelines, Lemon Bay reduced the number of slips on the dock from 13 to 9. Appx156, Appx273, Appx1510.

Despite its efforts, Lemon Bay was ultimately unable to rebut the Corps' presumption that less environmentally damaging practicable alternatives existed for Lemon Bay's development. The Corps issued a final denial of Lemon Bay's permit application on February 1, 2016 with prejudice. Appx1565-1566. It found the proposed project did "not comply with Section 404(b)(1) guidelines" and was "contrary to the public interest." Appx1565-1566. In support of its denial, it issued a Memorandum for Record documenting the review process and setting forth its findings and conclusions. Appx1569-1645. Lemon Bay administratively appealed the Corps' decision, and the Corps ultimately denied the appeal on December 19, 2016, thereby ripening Lemon Bay's taking claims and establishing the date of taking. Appx157.

III. THE TRIAL PROCEEDINGS

A. Lemon Bay's Trial Testimony And Evidence

In support of its taking claims, Lemon Bay presented the testimony of: (1) its managing member, Mr. Dominik Goertz; (2) Mr. Hugh Dinkler, a wetland ecologist; (3) Dr. Henry Fishkind, a real estate economist; (4) Dr. David DePew, a land use planner; and (5) Mr. Linwood Gilbert, a licensed Florida real estate appraiser. The witnesses testified as follows.

(1) Dominik Goertz's Testimony As To Lemon Bay's Acquisition and Efforts To Develop The Property

Mr. Goertz testified as follows: Lemon Bay was created by IHT to develop the Property after IHT foreclosed on the $750,000 loan it had made to Mr. LeFave. Appx173-174. In deciding to make the loan, IHT relied upon the fact that Mr. LeFave had secured Charlotte County's preliminary plan approval of a 39-unit condominium development on the Property, on a $4,740,000 appraisal of the Property based on its residential use, and upon the existing zoning which allowed 7.5 residential units per acre or up to 42 units. Appx175-176, Appx2514, Appx1070-1081, Appx1082-1086.

IHT's foreclosure judgment totaled $875,878.02 and IHT bid $15,200 at the foreclosure sale and acquired the Property believing it to be worth between $3½-4½ million. Appx177. After acquiring the Property, IHT deeded it to Lemon Bay and assigned its assets to Lemon Bay. Appx146, Appx174. Lemon Bay then

applied to SWFWMD for an ERP permit authorizing the bulkheading and filling in of a 1.95-acre mangrove portion of the Property to enable development of a 12-unit residential development. Appx178. SWFWMD approved the ERP permit in December 2012. Appx179, Appx1486.

After receiving SWFWD's approval, Lemon Bay submitted a section 404 permit to the Corps. Thereafter, Mr. Goertz attended a meeting with Corps representatives who indicated they "would never give us a permit to move forward on the property." Appx179. The application was amended to add a 13-slip boat dock, which was ultimately reduced to 9 slips. Appx179, Appx1510.

Mr. Goertz testified the effect of the Corps' permit denial was to deprive Lemon Bay of the economically beneficial use of the Property and the rights to bulkhead and fill it. He also testified the denial prevented Lemon Bay, which had received assignment of IHT's rights and interest under the foreclosure judgment, from recouping its investment as well as $400,000 incurred in attempting to obtain Corps approval. Appx179-180, Appx209. He also testified that the Corps never gave Lemon Bay indication of any reductions in the amount of proposed fill that might result in approval. Appx209.

(2) Hugh Dinkler, Environmental Permitting Expert's Testimony As To The Environmental Conditions And Permitting History Of The Property, Avoidance, Minimization and Mitigation Efforts And The Likelihood Of Obtaining State Approval Of ERP and The Multi-Slip Boat Dock

Mr. Hugh Dinkler, who qualified as an expert in wetland ecology and local, state, and federal wetland and submerged land permitting, testified based on his various field inspections. Appx262. He testified the Property's wetlands and functionality had been historically impacted by construction and runoff from Beach Road, by mosquito ditching and deposition of associated spoil piles, by placement of fill along the mangrove edge at the southeast corner of the Property, by installation of a below-ground water line and by scarring of the submerged bottom lands from propellors of motorboats. Appx263-264, Appx284.

He explained the additional avoidance and minimization efforts reflected in the 12-unit site plan as compared with LeFave's 39-unit site plan. Specifically, the direct mangrove impacts were reduced from 2.68 acres to 1.95 acres, the boat ramp and associated dredging and filling of the submerged mud flats and seagrass beds was eliminated, as were certain walkways and boardwalks. Appx267. Additionally, Lemon Bay proposed to preserve in its natural state roughly 3.64 acres or 63% of the Property consisting of the high-quality mangrove fringe and submerged lands below the mean high-water line and to donate these lands to the State of Florida thereby enabling expansion of the Lemon Bay Aquatic Preserve.

Moreover, Lemon Bay paid to reserve mangrove mitigation credits in the Corps approved Little Pine Island Mitigation Bank. Appx267-270.

Mr. Dinkler conducted a historical and existing environmental assessment of the Property finding little evidence of the wildlife typically listed for the Lemon Bay Aquatic Preserve. Appx1377-1381. He acknowledged that a number of wading birds might use the mangrove fringe, but not the interior mangrove portions of the Property, and noted that because the area below the mean high-water line, located 20-40 feet landward of the mangrove fringe, was to be preserved in its natural state, the proposed development would not have an adverse impact on wading birds. Appx1380, Appx263, Appx268, Appx283-284. The SWFWMD approved the ERP permit concluding that the proposed 1.95-acre fill with the proposed mitigation satisfied its permit criteria. Appx270.

The SWFWMD ERP application was simultaneously submitted to the Corps for its review. Appx270-271. Mr. Dinkler testified that thereafter "…in almost every meeting that we had [with Corps staff], we were instructed that the Fort Meyers office didn't approve projects that impact mangroves…we would be asked questions until we went away." Appx271.

Mr. Dinkler testified the 9-slip dock: (1) was located in the roughly 6-foot deep water portion of Kettle Harbor primarily outside of any submerged aquatic vegetation; (2) met the County's manatee protection regulations limiting the

number of allowable boat slips; (3) was designed to meet the USFWS's Manatee Key prescribing measures to minimize potential adverse impacts to manatees and shading of submerged aquatic vegetation; and (4) was designed to meet the State aquatic preserve and State sovereign lands multi-slip dock lease criteria. Appx273-275.

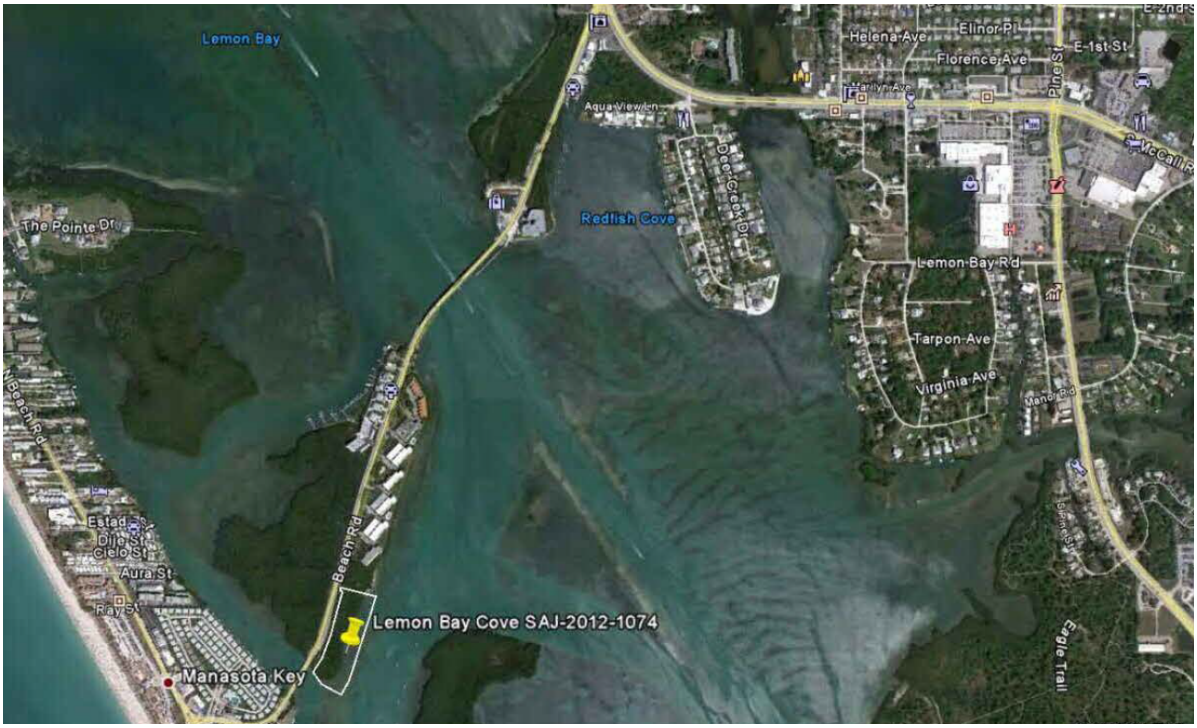
Based on the design and location of the boat dock, Mr. Dinkler did not anticipate significant impact on state or federally listed wildlife species. Appx275-276, Appx301. He also testified that factually the site's mangroves were not essential to fish because most lay above the mean high-water line and were only occasionally inundated. Appx966, Appx970. He further testified he had no concerns about whether SWFWMD or the State of Florida would grant sovereign lands authorization for the boat dock because the relevant criteria could be met. Appx277, Appx300. Notably, his testimony based on his experience, site-specific field study and analysis was not refuted by the Government with any comparable study or analyses.

(3) Dr. David DePew's Testimony As To Reasonable Probability Of That Charlotte County Approval And Would Have Approved And The Costs of Developing The 7-Unit Site Plan

Dr. David DePew, PhD, was accepted as an expert in land use planning and regulation, site design, development permitting, construction cost estimating and creation and utilization of transferable development right in Florida. Appx352,

Appx2344.

He testified the Property enjoys direct access to Beach Road, a major collector roadway connecting Englewood with Manasota Key that is operating at an acceptable level of service and that water, sewer, electric, telephone, cable, and internet are available at acceptable levels of service. Appx353-355. Additionally, he found that the surrounding area was highly developed, indeed almost fully built out. Appx355. See aerial photo below. Appx1569.



Dr. DePew further testified the Property's Medium Density Residential, (MDR) land use designation allowed up to 10 single-family residential units per acre and the Property's MMF 7.5 zoning allowed single-family residential use up

to 7.5 units per acre for a total of 42 residential units. Appx357-359. He pointed out the Property's land use and zoning is the same as the Sandpiper Key Condominium constructed on the previously filled-in portion of the Property's original larger parent tract. Appx358. He also considered that the County previously approved an amended plat for the Holiday Isles subdivision in the 1960s creating 37 lots a portion of which included the Property and reviewed the County approved LeFave 39-unit site plan concluding: (1) the conditions of approval were typical and could be satisfied; (2) the County's approval reflected its conclusion the plan was consistent with the County's Comprehensive Plan and land development regulations; and (3) the plan could have achieved final County approval. Appx362-363.

Additionally, Dr. DePew reviewed the SWFWMD approved 12-unit site plan and mitigation and concluded it was likely the County would approve a 2-acre fill associated with the 7-unit subdivision plan because the County coordinates its review with SWFWMD's review and approval and, therefore, was not likely to second guess SWFWMD's prior approval of the virtually identical fill footprint.[1] Appx360-361, Appx389.

[1] *See* Appx1106, Charlotte County Coastal Planning Element, CST Policy 1.1.4: Coastal Development Coordinated Review, stating:

> The County shall coordinate review efforts with other local, State and Federal agencies in evaluating proposed development activities in the

After receiving input from Dr. Fishkind as to the maximally productive residential development scenario, Dr. DePew developed a 7-unit site plan utilizing the nearly identical, previously SWFWMD approved fill footprint. Appx363-364. His 7-unit site plan assumed construction techniques to minimize the amount of fill required and a lot layout and site design consistent with the County's land development regulations, including the MMF 7.5 zoning regulations. Appx363-364, Appx359-360.

Dr. DePew then evaluated whether the County would approve the proposed 7-unit subdivision had the Corps issued the permit, concluding that it was reasonably probable, indeed almost certain that it would have. Appx364-365. In determining consistency of the 7-unit subdivision plan with the County's comprehensive plan and land development regulations, he looked to the comprehensive plan and land development regulation as a whole to arrive at his opinion giving greatest weight to the future land use and zoning which allowed 7.5 residential units per acre and which he characterized as the land use "keystones" applicable to the Property. Appx389-390.

He further concluded neither of these regulations prohibit wetland impacts.

CPA that may directly, indirectly and cumulatively impact coastal resources...

Appx388. Rather, they allow such impacts if adequately mitigated for.[2] Appx389. According to Dr. DePew, had the County intended to prohibit development of the Property, it would not have rezoned the Property from RM-10 to MMF 7.5 when it adopted the Manasota Key Overlay District in 2011. Instead, it would have designated the Property to a preservation or environmentally sensitive zoning category. Appx389.

Dr. DePew then estimated the costs of the horizontal components of the 7-unit site plan, including costs of: (1) bulkheading and filling; (2) wastewater and potable water facilities; (3) wetland mitigation; (4) landscaping, buffering and irrigation; (5) an entrance feature and (6) the boat dock. He arrived at an overall cost of the horizontal component of the 7-unit site plan of $918,000-935,000. Appx365-366, Appx368, Appx383, Appx392.

(4) Dr. Henry Fishkind's Testimony Relating To Highest And Best Use And The Effect Of The Corps' Permit Denial On Use And Development Of The Property And Bulkhead And Fill Rights

Dr. Henry Fishkind, PhD, who was qualified as an expert in real estate economics and transferable development rights, testified that a 7-unit single-

[2] *See* Appx1144 Charlotte County Natural Resources Element, ENV. Goal 3, Wetlands, stating that:

> ENV GOAL 3: WETLANDS
> Avoid, minimize, ***or*** mitigate impacts to wetlands by restoration, enhancement, creation or local wetland mitigation banking, when available. (emphasis supplied).

family residential subdivision would generate the greatest gross revenue and, therefore, would constitute the maximally productive use upon which to base a highest and best use determination. Appx437-441, Appx2665.

Dr. Fishkind also testified that the practical effect of the Corps' denial makes impossible any economic use of the Property or its sale to an environmental group for conservation purposes. Appx444-445. He further opined the Property could not be used for a water-dependent use such as boat launch or a marina because there would be no place to park, and a typical marina would involve more fill that than the 2-acre fill already rejected by the Corps. He concluded there was not a realistic possibility the Corps would permit any bulkheading and filling of the Property and the Corps' permit denial rendered the Property without economic value because without a Corps permit the Property has no economically beneficial use. Appx445, Appx449, Appx454-455.

Finally, he opined that without the ability to bulkhead and fill the Property, Lemon Bay's bulkhead and fill rights were effectively extinguished. Appx446.

(5) Linwood Gilbert's Testimony As To Before And After Value Of The Property And Bulkhead And Fill Rights

Linwood Gilbert, a Florida licensed real estate appraiser, who was accepted as an expert in real estate appraisal and valuation, testified to the value of the Property and of the bulkhead and fill rights as of December 19, 2016 both with

and without a Corps permit. Appx461-462. In valuing the Property, Mr. Gilbert found the highest and best use of the Property would be as a 7-unit residential subdivision with a 9-slip boat dock consistent with the site plan prepared by Dr. DePew. Appx467-469. He utilized the subdivision approach to appraising land. Appx465-466.

He first concluded based on a comparable sales analysis that the lots would command a price of $900,000 as a base price with the end lots commanding a premium because of their better views averaging $940,000 per lot. For all 7 lots, a total of $6,600,000. Appx469-472, Appx2600, Appx2607. Mr. Gilbert estimated the costs of developing the 7-unit subdivision's site improvements. In so doing, he arrived at a total site development cost, including related professional fees, real estate taxes, interest, developer's overhead, and profit of approximately $1,100,000. Appx462, Appx2651. He then prepared a cash flow analysis to arrive at net cash flows from sale of the lots, totaling $4,554,165, which he discounted to present value as of December 19, 2016, yielding a discounted present value of the Property and bulkhead and fill rights as of December 19, 2016 with the Corps permit of $3,793,415 rounded to $3,800,000. Appx474-475.

Mr. Gilbert then valued the Property assuming denial of the Corps permit. He found that without a Corps permit there is no economically beneficial use of the Property arriving at a value of the Property after the permit denial of $12,500.

Appx475-476. This nominal amount reflects a diminution in the value of the Property and bulkhead and fill rights due to the Corps permit denial of more than 99.7%.

B. The United States' Trial Testimony And Evidence

In opposition to Lemon Bay's taking claims, the Government presented the testimony of: (1) Tunis McElwain, Corp's permitting supervisor; (2) Suzanne Derheimer and Jamie Scudera, Charlotte County environmental specialists; (3) Mark A. Samrek, fishery biologist for the National Oceanic and Atmospheric Administration's National Marine Fisheries Service; (4) Andrew Dodds, a real estate broker with knowledge of Charlotte County's Transferable Density Unit program; (4) Ian Vincent, an environmental permitting consultant; and (5) John Underwood, a real estate appraiser.

(1) Tunis McElwain, Corp's permitting supervisor

Mr. McElwain supervised the Corps' review and denial of Lemon Bay's section 404 application. His testimony focused on the section 404 permitting review process and Lemon Bay's application in particular. He testified the Corps denied Lemon Bay's application because Lemon Bay failed to rebut the presumption of least damaging practicable alternatives and its proposed project was contrary to the public interest. He conceded, however, that neither the Corps, EPA, USFWS nor NMFS conducted any site-specific studies to support the

environmental, economic, or other harmful findings cited in the Memorandum of Record as the basis for permit denial. Appx552, Appx643. He further conceded Lemon Bay's proposed development would impact only .018% of the mangrove shoreline of Charlotte Harbor, and the removal of the 2 acres of mangroves would only reduce the roughly $11 billion value of Florida fisheries by $14,000 or .000133%. Appx966-967, Appx969-970, Appx643-644. He also indicated the Corps had requested Lemon Bay consider less impactful project proposals. However, he failed to identify either during the permitting process or at trial any specific, lesser amount of fill that the Corps might approve. Instead, he testified that as a matter of practice the Corp's does not make specific alternative, less impactful project proposals. Appx645-646.

(2) Testimony of Suzanne Derheimer and Jamie Scudera, Charlotte County environmental specialists

Ms. Derheimer and Scudera testified as to Charlotte County's site plan review process from the perspective of its environmental specialists. Appx653-655, Appx659-661. The County's site plan approval criteria require consideration of the "extent to which" a site plan is consistent with the comprehensive plan and land development regulations.[3] Appx2298, Appx779. Neither were familiar with

[3] § 3-9-7(e) states in material part:

> (2) *Action by zoning official.* The zoning official shall review the application for consistency with the comprehensive plan and these land development regulations. The zoning official shall issue the final

these criteria. Appx657-658, Appx665. Moreover, neither were authorized to interpret the County's Comprehensive plan or land development regulations, or to approve or deny site plans; only to make preliminary recommendations. And neither reviewed the proposed 7-unit site plan. Appx657-658, Appx665. Derheimer testified the County's wetland policies neither prohibited nor automatically required that wetlands be preserved in their natural state, but, at the applicant's option, allowed them to be impacted after avoidance, minimization, or mitigation. Appx658.

Ms. Scudera testified she reviewed the 39-unit site plan submitted by Le Fave. She did not object to or find the proposed 2.68-acre fill was non-compliant with the County's Comprehensive Plan or land development regulations, and instead recommended approval subject to conditions. Appx661, Appx667. She further testified that in conducting her review of site plans, she *never* considered the County's future land use plan, which in this case, allowed up to 42 residential units. Appx666. She also testified if a wetland parcel could not meet the County's

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decision to approve, approve with conditions or deny the site plan application. Where the zoning official denies the application, the reasons for denial shall be stated in writing for the record.

(3) *Approval Criteria.* In evaluating any proposed site plan, the zoning official shall consider the following:

a. The extent to which the proposed site plan is consistent with the comprehensive plan; and

b. The extent to which the proposed site plan is consistent with these land development regulations.

wetland impact regulations "they would essentially have to provide all state and federal permits showing that they have been permitted and authorized to impact wetlands." Appx665. Given that SWFWMD approved an ERP for virtually the same fill footprint as the 7-unit site plan, that approval would, according to Ms. Scudera, override any inconsistencies of the 7-unit subdivision plan with the County's comprehensive plan and land development regulations. This conclusion is consistent with the Natural Resources Element policy requiring the County to coordinate its wetland permitting decisions with state and federal agencies. Appx1106. It is also consistent with Dr. DePew's testimony. Appx360-361, Appx389.

(3) Testimony of Mr. Mark Samrek, NMFS Fisheries Biologist

Mr. Samrek, a fisheries biologist with NOAA, whose primary duty is to conduct advisory "Essential Fish Habitat" consultation with federal agencies, testified as a fact witness. He reviewed Lemon Bay's project, inspected the site, snorkeled the waters over which the dock was proposed, observed submerged aquatic vegetation, and concluded the project would adversely affect Essential Fish Habitat. Appx671-673. Mangroves and submerged aquatic vegetation are automatically treated as Essential Fish Habitat, regardless of whether, in a particular case, they are in fact "essential" under this definition. Appx673, Appx677. Notably, Mr. Samrek performed no site-specific scientific study or

analysis of whether removal of mangroves or construction of the dock would, in fact, adversely affect the ability of fish in Lemon Bay to spawn, breed, feed or grow to maturity. Appx677. His conclusion as to adverse impact was based solely on the presence habitat labeled as an Essential Fish Habitat.

(4) Testimony of Andrew Dodds, Valuation Transferable Density Units

The Government argued the Corps permit denial was not a taking because Lemon Bay could perfect and sell Transferable Density Units under Charlotte County regulations both before and after its permit denial. However, it offered no evidence or testimony that Lemon Bay's ability to perfect and sell TDUs contributes to the value of either the Property or the rights to bulkhead and fill it. The Government's appraiser, Mr. Carlson, conceded in his deposition that the availability of TDUs did not contribute to the value of the Property. Appx2295. The Government elected not to call Mr. Carlson at trial. Instead, it offered the testimony of Andrew Dodds, a real estate broker experienced in the Charlotte County TDU market. Mr. Dodds testified to the "potential" value of 42 TDUs from the Property was $504,000-630,000 assuming they could be perfected and sold to third parties. Appx2128, Appx751. However, he also conceded his opinion related to the value of the TDUs, not the value of the land, and he was not opining that the availability of TDUs actually contributed to the value of the land. Appx731.

The Trial Court ultimately found Mr. Dodd's opinions unpersuasive, lacking a sufficient factual predicate or indicia of reliability of his pricing of individual TDU transactions that were the basis for his valuation opinion. Appx21.

(5) Testimony of Ian Vincent, Environmental Consultant

Ian Vincent, the Government' environmental permitting expert testified that he believed the Charlotte County environmental department would not have recommended approval of Lemon Bay's proposed 7-unit site plan. Appx861-862. He based his opinion on his review of the Charlotte County Comprehensive Plan's environmental and coastal planning goals and the Manasota and Sandpiper Key Zoning Overlay District regulations. Appx879.

Mr. Vincent conceded he was not an expert in land use planning or site design. Appx776. He arrived at his opinion without knowing or considering the County's governing site plan approval criteria requiring consideration of the "extent to which" a site plan is "consistent" with the comprehensive plan and land development regulations. Appx2298, Appx779. With respect to "consistency" determinations, he further conceded he did not consider Florida statutory law governing: (1) determination of "consistency" of development with a comprehensive plans (2) how courts are to interpret comprehensive plans; (3) the legal significance of the future land use plan and map; or (4) the requirement that the County apply its comprehensive plan and land development regulations with

sensitivity to, and recognition and respect for constitutionally protected private property rights. Appx766, Appx773-775, Appx777-780. He conceded that he ignored the Property's future land use designation and zoning allowing up to 42 residential units, and instead, limited his review to the parts of the County's Natural Resources and Coastal Elements and land development regulations addressing wetland impacts, while ignoring the plan and regulations "as a whole." Appx779.

(6) Testimony of John Underwood, Review Appraiser

The Government presented the testimony of John Underwood, a real estate appraiser, who reviewed Linwood Gilbert's initial July 20, 2018 before and after valuation report of the Property and the rights to bulkhead and fill both with and without a Corps permit. He testified he did not feel that the initial report was credible for various reasons Appx891. However, Mr. Gilbert issued a revised report in November 2018, which Mr. Underwood testified he had not reviewed. It corrected the errors in his discounted cash flow analysis that Mr. Underwood identified. Appx940, Appx947. Mr. Gilbert further testified he disagreed with Mr. Underwood's criticism of his gross sales price. Appx977-978. Mr. Underwood acknowledged that he did not perform his own independent comparable sales analysis or appraisal of the Property upon which he based this criticism.

SUMMARY OF ARGUMENT

The Trial Court misapplied Lucas and its progeny is various respects. First, it failed to credit the fact that the Corps denied Lemon Bay's application with prejudice without leaving open the possibility it might approve a lesser fill footprint let alone that it would ever allow residential development of the Property. Second, the record evidence indicates the Corps would have denied any fill footprint given its near conclusive presumption of alternative sites in the case of non-water dependent residential uses. Third, the Property's land use and zoning did not allow alternative commercial water dependent uses such as a marina or boat launch, which, even if allowable, would have had greater fill requirements due to parking needs. Fourth, *Lucas* focuses on the effect of a Corps permit denial in a particular case; not on whether the Corps might conceivably approve some lesser impactful development especially where the Corps has given no indication that it might approve such development. Lemon Bay cannot be required to prove a negative (i.e., that the Corps would deny all less impactful alternatives). Fifth, the Trial Court ignored Lemon Bay's substantial efforts to avoid, minimize and mitigate the impacts of its proposed development. And lastly, the Trial Court ignored the undisputed fact that the Corps' permit denial left the Property and bulkhead and fill rights economically idle.

The Trial Court erred in not completely rejecting the Government's

argument that the availability of TDUs constituted a defense given that TDUs are not a use of land, and, in any event, the Government failed to establish that the availability of TDUs contributed to the value of the Property.

The Trial Court also erred in rejecting Lemon Bay's alternative Penn Central claim in various respects. First, the Trial Court held that the fact that Lemon Bay purchased the Property after the Corps permit regime was established rendered Lemon Bay's investment backed expectations unreasonable while ignoring considerable other evidence of the objective reasonableness of Lemon Bay's development expectations. The Trial Court also erred by concluding that the moderate, temporary, pro forma pollution resulting from Lemon Bay's removal of the mangroves and filling in of a relatively small fraction of the overall property outweighed the disproportionate burden placed on Lemon Bay's shoulders to preserve the Property in its natural state while forgoing the exercise of its vested rights to bulkhead and fill in the Property. The Trial Court likewise erred in concluding that Lemon Bay had not suffered severe economic harm. It credited the Government's environmental expert's legally flawed opinion that neither the State nor Charlotte County would approve Lemon Bay's proposed residential development and it failed to address the fact that the Corps permit denial prevented Lemon Bay from recouping an investment of over $1,200,000 in the Property. Finally, the Trial Court conclusion that the Corps permit denial did not amount to a

taking of Lemon Bay's vested bulkhead and fill rights is based on inapplicable caselaw that ignores the essential character of these proprietary rights under Florida Supreme Court precedent which is to create useable land

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a decision of the Claims Court, this Court reviews legal conclusions *de novo* and factual findings for clear error. *See Rose Acre Farms*, *Inc. v. U.S.* 559 F.3d 1260,1266 (Fed. Cir. 2009). Whether the United States has taken property is a legal question based on underlying facts. *See Maritran Inc. v U.S.*, 342 F.3d 1344, 1350 (Fed. Cir. 2003). "The Takings Clause requires careful examination and weighing of all the relevant circumstances." *Caquelin v. U.S.*, 140 Fed. Cl. 564, 578 (2018) (citing *Palazzolo*, 533 U.S. at 634, 636 (O'Connor, J., concurring)). Thus, where the Claims Court "failed to apply the evidence in a manner correct in all respects to determine whether [she] had an instance of taking before [her]…remand for determination of the taking question according to right principles…" is required. *Florida Rock Industries, Inc. v. U.S.*, 21 Cl. Ct. 161, 165 (1990).

II. THE TRIAL COURT ERRONEOUSLY CONCLUDED THE CORPS' PERMIT DENIAL DID NOT CONSTITUTE A *LUCAS* TAKING

A. The Trial Court Misapplied *Lucas*

The Trial Court determined no *Lucas* taking occurred because Lemon Bay

"never sought a permit for a development with less impact on wetlands and protected species" and instead, persisted in requesting a 12-unit, 2.08-acre development "to meet its own financial needs."[4] Appx2. The Trial Court concluded "the Corp's ultimate denial was limited to the discrete permit that Lemon Bay had sought…not any conceivable potential development of this land." Appx2. Citing this Court's unreported decision in *Mehaffy v. U.S.*, 499 Fed. Appx 18 (Fed. Cir. 2012), the Trial Court further concluded Lemon Bay did not prove the Corps' denial of its permit for a 12-unit project deprived the property all economic value as required to establish a categorical taking. *Id.*

In multiple regards, the Trial Court failed to weigh *all* relevant circumstances, apply the evidence in a correct manner, and contrary to law, misapplied *Lucas* as well as this Court's prior Claims Court decisions.

First, it is undisputed the Corps issued a final denial of Lemon Bay's permit application with prejudice. Appx1565-1566. If the Corps felt it would have permitted lesser fill footprints, it should have denied Lemon Bay's application without prejudice and invited it to submit lesser impactful alternatives. It chose not to. And the Corps never suggested any specific, fill footprint reductions that it might have approved. Appx645-646, Appx445. This Court has eschewed requiring "seriatum" Corps permitting exercises likening them to "the possibility one might

[4]It bears noting the factual record well established Lemon Bay's efforts to minimize its economic impact and comply with the Corps permit process.

put a pot of boiling water on a hot stove and have it freeze…" *Florida Rock Industries*, Inc., 791 F.2d at 904.

Second, both Domink Goertz and Hugh Dinkler testified the Corps advised them on several occasions they would not approve removal of mangroves from the Property. While the Corps denied ever having made such statements, they could only site examples of permitting removal of mangroves for shoreline stabilization and water dependent uses. Appx557-559.

Third, the evidence of record indicates the Corps would have denied *any* fill footprint especially given the futility of attempting to rebut the Corps' near conclusive presumption of less environmentally damaging practical alternatives in the case of residential, non-water dependent uses. *See Forest Properties, Inc. v. U.S.*, 39 Cl. Ct. 56, 78 (1997) (Claims Court observed "non-water dependent status of housing project makes likelihood of securing section 404 permit extremely unlikely.").

Fourth, the existing zoning did not allow alternative water dependent uses such as marinas or boat launches. It only allowed non-commercial boat docks. *See*, § 3-9-4(a)-(f), Charlotte County Land Development Code.[5] Lemon Bay sought and was denied a single, multi-slip residential boat dock.

[5]https://library.municode.com/fl/charlotte_county/codes/code_of_ordinances?nodeId=PTIIILADEGRMA_CH3-9ZO_ARTIIDIRE_S3-9-33RESIMIRS.

Fifth, even if allowable, Dr. Fishkind testified that based on his review of the permitting record, the Property could not be used for such water-dependent uses because there would be no place to park and a typical marina would involve more fill that than the 2-acre fill rejected by the Corps. He concluded there was not a realistic possibility the Corps would permit any bulkheading and filling of the Property. Appx445. His testimony was not refuted.

Sixth, the Court mistook the inquiry under *Lucas*. The question is not whether Lemon Bay's takings claim "account[s] for a possibility that all permits would not be obtained." *Loveladies*, 28 F.3d at 1175. Instead, the inquiry focuses on the *effect* of the Corps permit denial *in a particular case*. "The question at issue [in a *Lucas* taking case] is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner." *Id*.

Accordingly, in *Loveladies* the Claims Court considered and rejected the assertion of alternative permit possibilities as a defense to a taking. There, as here, the government argued there had not been a taking as a matter of law because the landowner failed to re-apply for a permit to fill a lower acreage amount than originally sought. See *Loveladies*, 21 Cl. Ct. at 157. The landowners argued further applications would have been futile, "giving rise to the equivalence of a presumption that there are no economically viable uses, and that the burden is on

defendant to prove otherwise." *Id*. The Court rejected the government's argument, explaining: "Plaintiffs bear the burden of proving the elements of their cause of action, including the absence of any remaining economically viable use. **Common sense, however, indicates the impossibility of requiring the Plaintiffs to prove a negative**." *Id*. (emphasis added).

Similarly, in *Palazzolo*, the U.S. Supreme Court found the lower Court erred in ruling that, regardless of regulatory denials, petitioner should have explored other uses of the property that would involve filling less wetlands. *Palazzolo,* 533 U.S. at 607-608 (noting there is no indication the Council would have accepted the application had the proposal occupied a smaller surface area). Likewise, In *City National Bank of Miami*, 33 Fed.Cl. at 230, the Claims Court rejected the proposition that a Plaintiff failed to present sufficient development alternatives during its application for a Corps permit, finding the Corps offered no suggestions as to possible alternatives or mitigation techniques which may have gained approval. The Court found it would be futile for Plaintiffs to make a reapplication to the Corps even if some alternative development existed. *See Id*. (citing *Bueré–Co. v. United States,* 16 Cl. Ct. 42, 51 (1988)); *see also Formanek v. United States,* 18 Cl. Ct. 785, 793 (1989) (noting Corps suggested no mitigation alternatives and inferring no practicable efforts could be taken to obtain Corps' approval). The Claims Court in *Lost Tree Village,* 115 Fed. Cl. at 230-231, also

rejected this proposition, finding prior attempts by the government to make this argument have been rejected by the Federal Circuit and the Claims Court.

Here, Lemon Bay cannot be forced to prove a negative (i.e., that the Corps would not approve any conceivable fill footprint). Yet that is exactly the basis of the Claim's Court's denial of Lemon Bay's *Lucas* taking claim. To argue Lemon Bay should have to serially reduce its fill footprint with lesser impactful development proposals, with no indication whether the Corps would approve any such proposals, places Lemon Bay on a regulatory merry-go-round. Such a proposition would last years, leaving the Property economically idle and effectively precluding Lemon Bay from ever establishing a *Lucas* taking.

Lastly, the Trial Court clearly erred by ignoring undisputed evidence as to Lemon Bay's efforts to avoid, minimize and mitigate its wetland impacts. There is no dispute that: (1) the Property consists of 5.64 acres, 97.4% of which are wetlands; (2) Lemon Bay avoided filling 2.08 acres or 63% of the Property; (3) Lemon Bay proposed to preserve and dedicate to the public the remaining unfilled 3.56 acre portion of the Property consisting of the most ecologically valuable submerged lands and mature mangroves lying below the mean high water line; (4) to further minimize its wetland impacts, Lemon Bay proposed a single, less impactful, multi-slip boat dock in the deeper waters along its water frontage rather than allowing for 9 individual docks spread out along the shallower more

ecologically sensitive portions of its water frontage; (5) to protect manatees, Lemon Bay agreed to comply with Charlotte County regulations limiting the number of boat slips to 9 and the USFWS Manatee Key; (6) Lemon Bay designed the dock to comply with State aquatic preserve and sovereign lands lease regulations; and (7) Lemon Bay reserved mangrove mitigation credits in the Corps approved Pine Island Mitigation Bank. The Trial Court failed to consider these avoidance, minimization, and mitigation efforts.

B. The Corps Permit Denial Left The Property Economically Idle

The test under *Lucas* is whether a government's regulatory act requires a landowner to leave his property "economically idle," that is, whether the regulation "denies all economically beneficial or productive use of land." *See Lucas* 505 U.S. at 1015, 1019. The Trial Court failed to recognize that Lemon Bay met its burden of showing a loss of economically beneficial or productive use of the land. Both parties' experts testified that without the Corps' permit, the property had no developmental use. Appx444-445, Appx947, Appx475-476.

In *Lost Tree Village*, the Claims Court found a taking took place where a Corps permit denial resulted in nominal land value. *See Lost Tree Village,* 115 Fed. Cl. 219. The Court stated:

> [t]he Plaintiff need only establish that said denial resulted in little or no economic use except at nominal levels. The Plaintiff will have established a *Lucas* taking if the taking resulted in nuisance value or environmental use which typically does not support significant

> economic value except in support of mitigation activities in development of other lands.

Id. at 228. In *Lost Tree Village*, the denial did not leave the parcel 100% valueless. Rather, without the Corps permit, the residential highest and best use of the property was not achievable. *Id.* at 228. This Court affirmed the Claims Court's decision. *See Lost Tree Village.*, 787 F.3d 1111; *see also Loveladies*, 28 F.3d at 1173, 1181 (concluding that remaining value was "de minimis," and therefore the parcel was "deprived of all economically feasible use.").[6] As this Court also held in *Palm Beach Isles*, "without the dredge and fill permits, the entire 50.7 acres . . . have no or minimal value." *Palm Beach Isles*, 231 F.3d at 1381; *see also Florida Rock Indus.*, 18 F.3d at 1567 (where the claims court found a categorical taking where permit denial resulted in 95% reduction in land value); *Resource Invs.*, 85 Fed.Cl. at 488 (noting categorical treatment remains appropriate so long as the claimant is without economically viable use of his property).

[6]The Trial Court rejected reliance upon *Lost Tree Village*, stating "the issue in *Lost Tree Village* was defining the parcel, not the scope and parameters of the requested permit." Appx19. The Trial Court overlooked this Court's and the Claims Court's subsequent decisions where the issue was whether denial of a permit by the Corps amounted to a categorical taking because it denied all economically beneficial or productive use of that parcel. *Lost Tree Village*, 115 Fed. Cl. at 231. The Claims Court concluded it did, and this Court affirmed. Both courts analyzed the exact issue in the instant action: whether a Corps permit denial **deprived Plaintiff of enough use or value to trigger** a *Lucas* per se taking. *See Lost Tree Village*, 787 F.3d at 1116-8.

The **highest and best** use of the property is the legal standard by which a landowner is held when determining whether a taking has occurred. *See Lost Tree Village*, 115 Fed.Cl. at 228. *Lucas* equates economically beneficial use with "habitable or productive improvements" to the land, not minimal possible use of the land. *Lucas* 505 U.S. at 1031. Here, the Court's dispositive reliance on its finding that Lemon Bay pursued a development "to meet its own financial needs" is clearly erroneous. Appx2. All property owners seek development to meet their "own financial needs." "[F]or what is the land but the profits thereof[?]." 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812).

It is undisputed the highest and best use of the Property is for residential development in the before taking scenario. The Government presented no testimony refuting Lemon Bay's economic expert, Dr. Fishkind, or its real estate appraisal expert on this point. Linwood Gilbert's, residential highest and best use, which is allowed under the existing land use and zoning. Nor did the Government refute Gilbert's $3,800,000 valuation of the Property in any meaningful fashion. Appx474-475. The Government did not rebut Mr. Gilbert's opinion that without a Corps permit, the property has a nominal value of $12,500. Indeed, Lemon Bay's experts, Dr. Fishkind and Linwood Gilbert, and the Government' appraisal witness, John Underwood, all testified Lemon Bay would have no economically beneficial use of the land without a Corps permit. Appx444-445, Appx947,

Appx475-476. The loss of the permit therefore resulted in a 99.7% reduction in the value of the land. Lemon Bay proved the effect of the Corps' permit denial was to leave the Property and bulkhead and fil rights economically idle thereby depriving it of all economically beneficial use of its property.

C. The Sale of TDUs Is Not An Economically Beneficial Land Use

At trial, the Government argued that Lemon Bay had not suffered a taking under *Lucas* or *Penn Central* because it could potentially sell 42 TDUs allegedly worth between $504,000-630,000 both before and after the permit denial. The Court concluded the record was insufficient for a ruling on this issue. However, this conclusion is erroneous as both a matter of law and fact. As a matter of law, availability of TDUs do not constitute a use of land that serves as a defense to a taking claim. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747 (1997) (Scalia, J. concur.) ("TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) 'attached.' The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land)."). No further record development was required to address this point of law. Even if TDUs were a potential defense to a taking claim, the Government failed to prove factually that the availability of such TDUs contributed to the value of the Property or the rights to bulkhead and fill it. Mr. Gilbert and Dr. Fishkind testified they did not. Their

testimony was unrebutted. Mr. Carlson confirmed this. Mr. Dodds conceded he was not opining the TDUs contributed value to the Property land. And the Trial Court concluded Mr. Dodds' TDU opinion was unpersuasive and lacked a sufficient factual predicate or indicia of reliability in his pricing of individual TDU transactions that were the basis for his valuation opinion. Appx21. Thus, contrary to the Trial Court's conclusion, the record clearly established the Government failed to meet its burden of proof on this point.[7]

III. LEMON BAY SUFFERED A REGULATORY TAKING UNDER THE *PENN CENTRAL* FRAMEWORK

A. Lemon Bay Had A Distinct And Reasonable Investment-Backed Expectation Of Developing The Property

In denying Lemon Bay's *Penn Central* claim, the Trial Court found Lemon Bay had no reasonable investment backed expectation due to its knowledge of the existing need to obtain section 404 regulatory approval to fill wetlands. Appx24. The Trial Court's exclusive reliance on this preexisting regulatory scheme is contrary to law and ignores ample unrefuted testimony.

Under *Penn Central,* the court inquires as to whether the takings claimant's investment-backed development expectations are objectively reasonable and distinct. *See Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010)

[7]The Pacific Legal Foundation has requested leave to file an amicus brief addressing the TDU issues in greater detail. Neither Lemon Bay nor the United States have objected.

(stating *Penn Central's* reference to "distinct" means "capable of being easily perceived, or characterized by individualizing qualities" and "'[d]istinct investment-backed expectations' implies reasonable probability" of recovery on the investments); *see also Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999).

In *Palazzolo*, the Supreme Court rejected a rule that "[a] purchaser…is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. at 608. According to the Court, "[p]re-existing regulations are not necessarily dispositive of the reasonableness of a landowner's expectations." *Id.*; *see also Norman v. United States,* 429 F.3d 1081, 1092 (2005). Under *Palazzolo*, a pre-existing regulatory scheme is but "one factor" to consider in assessing a regulation's impact on investment-backed expectations. *See Id.* at 634. Moreover, as the Claims Court concluded in *Forest Properties, Inc. v U.S.*, 39 Fed Cl. 56, 71 (1997), "'after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.'" (quoting *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985)). Moreover, the Trial Court ignored the following considerable evidence of the objective reasonableness of Lemon Bay's expectations:

(1) The Property carries with it the vested statutory right to bulkhead and fill the land;

(2) Both the County and the Corps previously approved the bulkheading and filling of a much larger, 12-acre portion of the property's parent tract that also carried with it the same vested bulkhead and fill rights;

(3) The property is in a prime location having access to a major roadway connecting Manasota Key with Englewood in an area already heavily developed with commercial and residential development;

(4) The property is designated Medium Density Residential under Charlotte County's Future Land Use Map. The property is zoned Medium Density Multi-Family. The land use and zoning allow residential, commercial, and other types of use, including single and multi-family residential at a density of up to 7.5 units per acre for a total of 42 units;

(5) In 2007, Charlotte County preliminarily approved a site plan for a condominium project of 39 or 92.9% of the available units on 2.68 acres or 47.5% of the Property's overall 5.64 acres;

(6) In 2011, Dominik Goertz, on behalf of IHT, received an appraisal valuing the Property at $4,470,000 for residential development;

(7) In 2012, the Southwest Florida Water Management District issued an Environmental Resource Permit approving the filling of the virtually identical 1.95-acre portion of Property for residential development purposes;

(8) Lemon Bay's proposed development sought to utilize only 12 or 28.6% of the 42 available units and to bulkhead and fill only 2.09 acres or 37% of the Property's overall 5.64 acres while preserving the balance; and

(9) Lemon Bay hired experts to assist it with permitting who advised the proposed development could be compliant with applicable state and local regulations, including the County's comprehensive plan and land development regulations, the County wetland comprehensive plan policies and land development regulations, by avoiding filling 65% of the Property, preserving a mangrove shoreline buffer, preserving the submerged portions of the Property and securing mangrove mitigation credits in the Pine Island Mitigation Bank sufficient to offset the impacts of its proposed filling.

Additionally, the Trial Court's holding on Lemon Bay's expectations contradicts its holding rejecting Lemon Bay's *Lucas* claim, the latter of which presumes Lemon Bay could have obtained permits. Appx22-23. If the Trial Court credits the Corps' testimony suggesting Lemon Bay failed to consider lesser impactful development alternatives, then the Trial Court cannot also find Lemon Bay's investment backed expectation in permit approvals was unreasonable.

B. The Character Of The Governmental Action Weighs In Favor Of Finding A Taking

In considering the character of the government action, the standard under *Penn Central* is whether a burden benefiting the public was "placed

disproportionately on a few private property owners." *Cienega Gardens*, 331 F.3d at 1338. *Cienega Gardens* reviewed the character of the government action by weighing the intention to "prevent injury to the public welfare" vs. "merely bestowing upon the public a nonessential benefit." *Id*. To determine whether a burden benefiting the public is being placed disproportionately on a landowner, the Court should look to the benefit bestowed upon the public by the Corps' section 404 guidelines. As observed in *Resource Investments*, "the mere purpose of the government action being beneficial or deriving from an intent to help the public does not immunize the government's actions under this prong of *Penn Central*." 85 Fed.Cl. at 517. "Instead, the court must consider the nexus between the regulation and it effects looking at the relative benefits and burdens associated with the regulatory activity." *Id.* "In doing so, the court reviews '[t]he purposes served, as well as the effects produced, by a particular regulation [to] inform the takings analysis.'" *Id*. (citing *Palazzolo,* 533 U.S. at 633–34).

Under this Court's precedent, "a 'partial taking' occurs when a regulation singles out a few property owners to bear burdens, while the benefits are spread widely across the community." *Id*. (citing *Florida Rock*, 18 F. 3d at 1571).

In reviewing of the character of the governmental action, the Trial Court placed great emphasis on Mr. Samrek's testimony that the wetlands were high quality and were designated as "essential fish habitat" and an "aquatic resource of

national importance." However, this characterization is suspect in the face of uncontradicted evidence that the mangroves were previously impacted by fill and by mosquito ditching. *See Lost Tree Village Corp v. U.S.*, 100 Fed.Cl. 412, 439 (2011) (finding suspect Corps findings of adverse environmental impact under similar circumstances). Moreover, the Corps failed to conduct any site-specific scientific studies or analysis to support why the 2.08 acres of wetlands were "essential" to the ability of fish in Lemon Bay to spawn, breed, feed and grow to maturity or what made the wetlands nationally important. Appx677. The Corps concern was almost exclusively the continued existence of the wetland, not the temporary and moderate pollution incident the filling of 2.08 acres of wetlands. Moreover, Lemon Bay's proposed development would have impacted a mere .018 % of the mangrove shoreline of Charlotte Harbor, and, according to the Corp's Memorandum of Record, would have only reduced the estimated $11 billion value of Florida fisheries by $14,000 or .000133%. Appx643-644, Appx966-967, Appx969-970. In contrast, the permit denial reduced the potential value of the Property and the rights to bulkhead and fill it from $3,800,000 to $12,500, a 97.4% reduction in value.

In *Fla. Rock Indus. v. U.S.,* 791 F.2d 893 at 904 (Fed.Cir. 1986), this Court found with respect to the proposed filling of 98 acres of wetlands:

> [A] moderate and *pro forma* polluter such as *Florida Rock* does no harm. Denial of the permit requires it to maintain at its own expense a

> facility, the wetlands, which by presently received wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaining such facility. This appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation for any loss actually incurred. The private interest, unless relieved by a Tucker Act award, sustains what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other expenses, and not to receive business income from the property in return.

Here, the burden of the permit denial was solely and disproportionately placed upon Lemon Bay. While the permit denial benefitted the public by preserving and protecting wetlands, it only burdened Lemon Bay by forcing Lemon Bay to forego economically valuable development of its property, to leave its property economically idle and to maintain the property in its natural state. That burden falls exclusively and disproportionately on Lemon Bay's shoulders. This factor weighs in favor of Lemon Bay.

C. The Economic Impact On Lemon Bay Was Severe

Under *Penn Central*, The economic impact of the regulation on the claimant is "measured by the change, if any, in the fair market value caused by the regulatory imposition." *Fla. Rock Indus.*, 18 F.3d at 1567 (internal citation omitted). It requires a comparison of "the value that has been taken from the property with the value that remains in the property...." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497 (1987). "In determining the severity of

the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation" is also considered. *Fla. Rock Indus.,* 18 F. 3d at 1567.

In its final judgment the Trial Court concedes "it is obvious that Plaintiff's property would be far more valuable if it were a residential development rather than unspoiled wetlands." Appx26. However, she concluded "Plaintiff has not established financial loss attributable to the Corps' denial of its permit application, given its failure to prove that it would have obtained the necessary SWFWMD ERP and site plan approval from Charlotte County." Appx26.

The Trial Court's conclusions cannot be squared with *Ciampetti v. U.S.*, 18 Cl. Ct. 548 (Fed. Cl. 1989). In *Ciampetti*, this Court reasoned that "the federal government retains independent control over its own regulatory action...the process for obtaining a permit under 404 begins and ends with the Corps." *Id.* at 555. As further explained by the Court:

> Assuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no Fifth Amendment remedy merely because two government entities acting jointly or severally caused a taking.

Id. at 556. Here, as in *Ciampetti*, the Corps made their own separate, independent, merits-based decision to deny Lemon Bay's section 404 permit. It cannot escape the consequences of that by pointing to Lemon Bay's inability to secure necessary permits from other government agencies in order to defeat Lemon Bay's *Penn Central* taking claim.

Essentially, the Trial Court's conclusion rests upon the theory that any use that is dependent upon the consent of government for its approval means that a permit denier cannot be charged with loss arising from the prohibition. This argument was rejected by the Claims Court in *Florida Rock Indus., Inc*. v. U.S., 8 Cl. Ct. 160, 168 (1985):

> Defendant's argument badly distorts the nature and function of a free society where the right to own and enjoy property is a fundamental aspect of personal liberty, not a privilege dependent upon the whim of the sovereign.

For takings analysis purposes, it should not matter whether the governmental consent is that of the permit denier or , as here, some other state or local agency.

The Trial Court's conclusion also presupposes the taking of Lemon Bay's property by other state and local agencies. This conclusion runs afoul of the well-established principal that "[t]he government may not lower the fair market value of [a property] by relying on the possibility of the very taking at issue. Prior attempts by the government to make this argument have been rejected by the Federal Circuit and this court's predecessor." *Lost Tree,* 115 Fed.Cl. at 230-233. For example, In *Loveladies,* the Plaintiffs asserted the highest and best use for the disputed property and submitted an appraisal assuming such development. *Loveladies,* 21 Cl.Ct. at 156 & 156 n. 5 (1990). The defendant in *Loveladies* argued plaintiff's appraisal was "inadequate because it d[id] not account for a possibility that all permits would not be obtained, a factor by which a knowledgeable buyer would discount his

purchase price." *Id*. The Claims Court rejected the argument that plaintiffs have no economic impact from denial of the underlying permit. *See Lost Tree Village,* 115 Fed.Cl. at 230-231 (recalling a similar argument made before the Federal Circuit in *Florida Rock Indus v U.S.*, 791 F. 2d 893, 905 (Fed. Cir. 1986) and stating "[t]his argument is reminiscent of defendant/appellant's argument in *Florida Rock* [,] to which the Federal Circuit responded, 'We suppose appellant added this contention to provide a little humor for an otherwise serious and scholarly brief, and say no more about it…' Neither shall this court.").

As to the likelihood of obtaining an ERP permit and site plan approval from Charlotte County, the Trial Court clearly erred. It credited the testimony of Ian Vincent. However, he did not testify that the County zoning official authorized to approve site plans would not approve the 7-unit site plan; only that he believed the environmental department, which lacks site plan approval authority, would not recommend its approval. Appx779. Moreover, Mr. Vincent conceded he was not an expert in land use planning or site design. Appx776. And, as is discussed in greater detail at pages 32-33 *supra*, Mr. Vincent's opinion was seriously legally flawed in multiple respects not the least of which was that he was unaware of the County's site plan review criteria which clearly required consideration of consistency of the site plan with the Comprehensive Plan as a whole. Obviously, you cannot properly determine the "extent to which" a site plan is consistent with

the County's comprehensive plan by "cherry picking" a few provisions of the plan and regulations.

Moreover, the County environmental specialists both testified the environmental department only makes recommendations, and, therefore, Mr. Vincent's testimony does not establish the reasonable likelihood that the zoning official would deny the 7-unit site plan. Further, he was unfamiliar with the relevant statutory law governing consistency determinations, and only reviewed the County's wetland related Comprehensive Plan policies in isolation from the plan as a whole while ignoring the future land use plan, map and zoning allowing up to 42 residential units. Appx2297-2298, Appx777-779. By crediting Mr. Vincent's testimony, the Trial Court's conclusions suffer from the same flaws as did Mr. Vincent's.

In contrast, Dr. Depew testified permitting reviewers place primary focus on the future land use map "and then [] look at the land use element to see what it says about that comprehensive plan designation." Appx389. Dr. Depew further testified he considered the relevant statutory laws governing consistency determinations, the prior approved permit and mitigation plan, as well as the comprehensive plan, the MDR future land use map designation, map, the zoning designation, the prior County subdivision and site plan approvals, and determined the 7-unit proposal "decreased the overall intensity by a considerable factor on the subject property,

and so we knew that it was consistent with the comprehensive plan and the future land use designation on the property." Appx363-365.

Dr. DePew also reviewed the prior SWFWMD ERP approval authorizing a 1.95-acre fill footprint that was virtually identical to the 7-unit site plan's 2.08-acre fill footprint. He concluded it was likely Charlotte County would approve a 2.08-acre fill because the County Comprehensive Plan requires it to coordinate its review with SWFWMD's review and approval and, therefore, was not likely to second guess SWFWMD. Appx352, Appx360-365, Appx369. Ms. Scudera, the County environmental specialist testified that if a wetland parcel could not meet the County's wetland impact regulations "they would essentially have to provide all state and federal permits showing that they have been permitted and authorized to impact wetlands." Appx665. Given that SWFWMD had approved an ERP for virtually the same fill footprint as the 7-unit site plan, that approval would, according to Ms. Scudera, override any inconsistencies of the 7-unit subdivision plan with the County's comprehensive plan and land development regulations. This conclusion is consistent with the County Comprehensive Plan Natural Resources Element policy requiring the County to coordinate its wetland permitting decisions with state and federal agencies. Appx1106. It is also consistent with Dr. DePew's testimony. Appx360, Appx389. Indeed, there was no credible evidence SWFWMD would deny an ERP permit to fill a footprint

virtually identical to that it had previously approved for the identical property. Mr. Dinkler, Lemon Bay's expert, testified he had no concerns about whether SWFWMD or the State of Florida would grant sovereign lands authorization for the boat dock because the relevant criteria could be met. Appx277, Appx300-301. His testimony was unrebutted. Without explanation, the Court failed to acknowledge or give weight to this testimony and evidence. Her exclusive reliance upon the testimony of Mr. Vincent was clear error that should leave this Court with a profound conviction that a mistake was made.

Finally, the Court overlooked Lemon Bay's shareholder IHT's investment of approximately $1,291,078 reflected in IHT's foreclosure judgment, the rights of which IHT, as shareholder, assigned to Lemon Bay. Without dispute, Lemon Bay is unable to recover this investment due to the Corps' permit denial, and it constitutes serious economic harm.

D. The Trial Court's Conclusion That The Corps' Permit Denial Did Not Take Lemon Bay's Bulkhead and Fill Rights Is Contrary to Law

Citing *Good v. United States*, 39 Fed Cl. 81, 98 (1997) and *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 (11th Cir. 1996), the Trial Court erroneously concluded that, even assuming Lemon Bay demonstrated a vested right to bulkhead and fill the Property, the Corps permit denial could not, as a matter of law, constitute a taking of those rights. Appx27. The Trial Court erred. *Good* and *Corn* are clearly inapplicable. Both cases dealt with vested rights under

Florida common law to pursue development of a "*particular* development plan" or a *particular* "Project" on the land in question where other uses were available to the landowner. *See Good,* 39 Fed. Cl. at 98 (emphasis supplied); *Corn,* 95 F.3d at 1073. Neither addressed the special statutory riparian right to bulkhead and fill submerged lands involved in this case. These rights are the rights to create the useable uplands *in the first instance.* The Florida Supreme Court holds these rights to be "clearly necessary[in] order to reclaim these [submerged] lands and [turn] them into useful property." *Trustees of Internal Improvement Trust Fund*, 86 So.2d at 789. The Supreme Court also holds these rights to be [the landowner's] only present rights attributable to ownership of the submerged land itself" which constitute "'property'…that includes the right to acquire, use and dispose of it for lawful purposes." *Zabel v. Pinellas County Water & Navigation Authority*, 171 So. 2d 376, 376, 380-81 (Fla. 1965). Because Lemon Bay's bulkhead and fill rights constitute special riparian rights, appurtenant to and severable from the land to which they appertain, the Trial Court's holding that such rights cannot be taken as a matter of law is clearly erroneous. Indeed, the Corps' permit denial amounted to a taking of these rights irrespective of whether Lemon Bay demonstrated it could have received SWFWMD and Charlotte County approvals which become meaningless if Lemon Bay is denied the ability to create useable uplands.

CONCLUSION

For the foregoing reasons, the Trial Court, in rejecting Lemon Bay's taking claims, failed to weigh *all* the relevant circumstances and apply the evidence in a manner correct in *all* respects. This Court should reverse the judgment of the Trial Court, hold that the Government affected a compensable regulatory taking of Lemon Cove's property and bullhead and fill rights, and remand for further proceedings as appropriate.

Respectfully submitted,

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ADDEDUM

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Addendum

In the United States Court of Federal Claims

No. 17-436L
(Filed: July 15, 2022)

LEMON BAY COVE, LLC,	*	**Fifth Amendment Taking; Army Corps of Engineers' Denial of Permit to Bulkhead and Fill; Categorical Lucas Taking; Penn Central Regulatory Taking.**
Plaintiff,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

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POST-TRIAL OPINION

WILLIAMS, Senior Judge.

This Fifth Amendment taking case comes before the Court following a trial on liability and damages. Plaintiff, Lemon Bay Cove, LLC ("Lemon Bay"), seeks $3,800,000 as just compensation for a taking of its property containing submerged land and mangroves. Alleging a categorical taking claim, Plaintiff contends that the United States Army Corps of Engineers' denial of a permit to bulkhead and fill 2.08 acres deprived it of all economically beneficial use of its land. Alternatively, Plaintiff claims the denial of the permit was a regulatory taking under Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978), in light of its distinct investment-backed expectations, the character of the governmental action, and the permit denial's economic impact.

Although the Corps' permit denial prevented Plaintiff from developing the project it proposed, Plaintiff has not established that this discrete permit denial deprived Plaintiff of all beneficial economic use of its property. Despite the Corps' repeated requests that Plaintiff minimize its footprint on the wetlands, Plaintiff never sought a permit for a development with less impact on wetlands and protected species. Rather, Plaintiff persisted in requesting a 12-unit 2.08-acre development to meet its own financial needs. As such, Plaintiff has not demonstrated a categorical taking that denied all potential development or all productive or economically beneficial use of its land.

Nor has Plaintiff demonstrated the elements of a regulatory taking. First, Plaintiff failed to establish that it had reasonable investment-backed expectations in its development project because as Plaintiff knew, both federal and state regulatory regimes imposed significant restrictions on developing wetlands that could ultimately prevent it from developing the land. Second, Plaintiff failed to demonstrate that the governmental action of protecting wetlands resulted in a disproportionate burden on Plaintiff which should have been borne by the public. Finally, Plaintiff failed to demonstrate a substantial economic loss attributable to the Corps' permit denial as there were other state and local hurdles affecting its development that Plaintiff had not met.

Findings of Fact[1]

Lemon Bay's Acquisition of the Property

Plaintiff Lemon Bay is a limited liability company that owns 5.64 acres of submerged lands, mangroves and scattered isolated uplands on Sandpiper Key in Charlotte County, Florida. Tr. 55-56; JX 140 at 16. Lemon Bay was formed in 2011, solely for the purpose of developing this property. Tr. 57-58. Dominik Goertz is the day-to-day managing member and authorized agent of Lemon Bay and was Lemon Bay's corporate representative in this proceeding. Tr. 55; Stip. ¶ 42. Mr. Goertz also has been a consultant and financial advisor to I.H.T. Corporation, a Florida real estate company owned by his business partner. Tr. 57; Stip. ¶ 42.

The property at issue consists of three parcels and abuts and lies partially beneath the tidal waters of Lemon Bay. Stip. ¶ 3. In 1986, the Florida legislature designated the submerged lands in the Lemon Bay estuarine system as the Lemon Bay Aquatic Preserve. Stip. ¶ 4. The property is comprised of tidal habitats such as tidal flats, seagrass beds and mangroves, and the submerged part of the property serves as a habitat for birds, fish, sea turtles and the West Indian manatee. Stip. ¶¶ 5, 7.

In 1954, Earl Farr purchased the entirety of Sandpiper Key, containing 33.2 acres, from the Florida Trustees -- the Florida Governor and Cabinet. JX 2; Tr. 338. In 1955, Mr. Farr sold the entire tract of land, a portion of which contained the Lemon Bay property, to John Stanford. JX

[1] These findings of fact are derived from the record developed during a 10-day trial, which took place via Zoom videoconferencing. Additional findings of fact are in the Discussion section. The Court uses "PX," "DX" and "JX" to designate exhibits admitted during trial and "Tr." to cite trial testimony. The parties' Stipulations of Fact (ECF No. 111) are cited as "Stip." Grammatical errors in quotations from the record have not been corrected.

3. In 1960, Charlotte County granted Mr. Stanford a permit to fill "portions of the parent tract, including the [Lemon Bay] Property" and, in 1961, both the Trustees and Army Corps of Engineers approved a fill permit for land that included the Lemon Bay property.[2] Stip. ¶ 18; DX 2; DX 3; DX 4. By 1970, Mr. Stanford had filled the northwest portion of Sandpiper Key, but the area that constitutes Lemon Bay's property remained unfilled and undeveloped. Stip. ¶ 19; Tr. 593-94. In 1980, Sandpiper Key Associates acquired the entire 33.2-acre tract of Sandpiper Key from Mr. Stanford for $1,726,699.93 and constructed a 79-unit condominium development, the Sandpiper Key Condominium Complex, on the portion of the property that had been filled. JX 9; Stip. ¶ 22. The wetlands containing Lemon Bay's property remained untouched. Stip. ¶¶ 19, 23.

By the early 1990's, Sandpiper Key had stopped paying real estate taxes on the undeveloped portion of the tract. JX 10 at 1-3; Tr. 594; Stip. ¶ 24. In August 1993, Gerald LeFave purchased three parcels of this unfilled tract, totaling 5.62 acres, at a tax sale from Charlotte County for $12,100 and sought to develop the property, eventually seeking approval to build a 39-unit development. Stip. ¶ 25; JX 10 at 1-3. Mr. LeFave did not submit his proposal to the Southwest Florida Water Management District or to the Army Corps of Engineers – only to Charlotte County. Tr. 564, 568. In November 2007, Mr. LeFave obtained preliminary site plan approval from Charlotte County for his development subject to 34 conditions. Stip. ¶ 32; JX 23. Upon obtaining this preliminary approval, Mr. LeFave sought investment capital for his development, the Verandahs at Lemon Bay. Stip. ¶ 34; Tr. 59-60, 63.

In 2008, I.H.T. Corporation, on the advice of Mr. Goertz, its financial advisor, loaned Mr. LeFave $750,000 secured by this 5.62-acre property. Stip. ¶ 36; Tr. 56-58; JX 25. In Mr. Goertz's view, this loan functioned as a mortgage that would be repaid when the borrower obtained the resources to proceed with development and then be converted into a construction loan. Tr. 56-57. As a condition of the loan, Mr. LeFave agreed to provide I.H.T. with copies of invoices for obtaining "developmental entitlements for the property." JX 25 at 2. At the time of the loan, Mr. Goertz was aware that Mr. LeFave had been advised of challenges in obtaining permits for the property. Mr. Goertz testified:

> Q: COUNSEL FOR DEFENDANT: Do you know whether DMK[3] informed Mr. LeFave that his planned development would not be easy to permit because of the impacts to wetlands on the property?
>
> …
>
> A: MR. GOERTZ: Yes, we were aware, not at each level, but we were aware about the red flags that Mr. LeFave has to work on.

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[2] Although the Corps has regulated activities in United States waters since the 1890's, the permit at issue here, a Section 404 permit, did not come into play until 1975, with the promulgation of the Section 404(b)(1) Guidelines. 40 Fed. Reg. 31,320 (1975).

[3] DMK Associates is an engineering and land surveying firm in Florida. JX 26. Mr. LeFave hired DMK for his 39-unit condominium development project, and Lemon Bay later hired DMK to assist with its proposed development of the same property. Tr. 124, 141-42; Stip. ¶ 52.

Tr. 124-25.

When determining whether to extend the loan, I.H.T. requested an appraisal of the property and the development plan from Mr. LeFave. Tr. 61-63. The appraisal, prepared by Certified Appraisal Services, Inc. on April 5, 2007, for Fusion Mortgage Corporation of Tampa, Florida, stated that the site:

> has some mangroves and wetlands but is considered an excellent location for multi family development. There are condominiums all along Beach Road which demonstrates the success of multi family development in the area.

PX 12 at 3. The stated "intended use" of the appraisal was "to assist the client in arriving at a[] 'Subject to Entitlements' Market Value with a zoning designation of RMF-10 (Residential Multi Family 10 Units per acre)." PX 12 at 4. The appraisal defined entitlements as "secured legal permissions from regulatory bodies (typically in the form of permits, but sometimes in the form of re-zoning or planned unit developments)." Id. (emphasis in original). The appraisal valued the 5.62-acre property at $4,740,000 when developed into multi-family housing, which the appraisers considered the highest and best use of the property, but did not state the number of housing units. PX 12.

In June 2010, Mr. LeFave defaulted on the I.H.T. loan, and a Florida court granted summary judgment to I.H.T. in the foreclosure proceeding, awarding I.H.T. $875,878.02. JX 33; JX 36 at ¶¶ 3, 7. According to the final foreclosure judgment, this amount included $750,000 in principal, plus a $75,000 late fee, $46,027.52 in interest, $2,500 in attorney's fees, and $2,350.50 in costs. JX 36 at ¶ 6.

A foreclosure sale was held on September 3, 2010. JX 41. According to the foreclosure judgment, I.H.T. was allowed to bid at the sale, and if successful, was entitled to a credit on its bid up to the full amount due under the judgment after the payment of costs. JX 36 at 3; see JX 40, JX 41. Under Florida law, the foreclosing mortgagee receives a bidding credit amounting to the principal and interest due under the mortgage and its costs of foreclosing. See generally RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) (stating that secured creditors have a right to credit-bid at bankruptcy auctions); Branch Banking & Trust Co. v. Tomblin, 163 So. 3d 1229, 1230 (Fla. Dist. Ct. App. 2015) (noting that credit bidding is a judicially created right to bid at a foreclosure sale the amount due on first mortgage debt). At the foreclosure sale, I.H.T., using its credit bid and a payment of $15,200, purchased the property. JX 36 at ¶ 10; JX 40; JX 41.

Once I.H.T. obtained possession of the property, Mr. Goertz, in his role as I.H.T.'s financial advisor, advised I.H.T. to move the property to a development company. Tr. 55, 58. In November 2011, after determining that I.H.T. would be unable to recoup its investment by selling the property as-is, Mr. Goertz and Nils Richter[4] "decided to develop the property . . . and formed a development company [Lemon Bay]" for that purpose. Tr. 57, 139. I.H.T. then "moved the assets, the judgment, and all the rights to develop the property into [Lemon Bay]." Tr. 57. I.H.T. became a

[4] Mr. Richter was a real estate agent and a "very close business associate" of Mr. Goertz for over 20 years. Tr. 137.

member of Lemon Bay and sold the property for $10 via quitclaim deed to Lemon Bay on November 9, 2011. JX 47; Tr. 57-58. Mr. Goertz considered the 2010 Florida court judgment awarding I.H.T. $875,878.02 on Mr. LeFave's defaulted loan to be I.H.T.'s "investment" in the property. Tr. 139.

Charlotte County Zoning Requirements

The property Lemon Bay acquired was subject to Charlotte County's land development regulations, called the Manasota and Sandpiper Key Zoning District Overlay, codified in Section 3-9-50 of Charlotte County's laws and ordinances. JX 138 at 6. The District Overlay land development regulations include 10 zoning districts including Manasota environmentally sensitive (MES), as well as single-family and multifamily districts, and several commercial and special districts. JX 138 at 8-9. At the time of both I.H.T.'s loan in 2008, and Lemon Bay's acquisition in 2011, the property was zoned MMF-7.5, which allowed for single and multi-family residential use at a density of up to 7.5 units per acre. PX 1 at 6; Tr. 510. This zoning permitted a maximum of 42 units on the property. Tr. 793.

The Charlotte County and Southwest Florida Restrictions on Wetland Development

Lemon Bay's property contains Category I wetlands, defined as "critically necessary to sustain the health of the County's environment," and a landowner must receive approval from Charlotte County in order to develop this type of property. JX 44 at 40. To obtain site plan approval from Charlotte County, the property must conform to the County's Comprehensive Plan, which restricts development of Category I wetlands to "cases where no other feasible and practicable alternative exists that will permit a reasonable use of the land." JX 44 at 41.

According to the Charlotte County Comprehensive Plan:

> Category I wetlands are those wetlands that are considered critically necessary to sustain the health of the County's environment and shall mean those wetlands that meet at least two of the following criteria:
>
> 1. Any wetland of any size that has a permanent surface water connection to natural surface waterbodies with special water classifications, such as an Outstanding Florida Water, an Aquatic Preserve, or Class I or II waters. . . .
> 2. Any wetland of any size that has a direct connection to the Floridan aquifer by way of an open sinkhole or spring.
> 3. Any wetland of any size that has functioning hydroperiods with minimal human disturbance and provides critical habitat for listed species.
> 4. Any wetland of any size whose functioning hydroperiods are connected via a direct natural surface water connection to parks or conservation lands.
> 5. Any wetland of any size where downstream or other hydrologically connected habitats are significantly dependent on discharges from the wetland.

JX 44 at 40.

According to Ian Vincent, Defendant's expert in environmental permitting and environmental land use approval in Southwest Florida, Lemon Bay's wetlands met criteria 1, 3,

and 4 of the Comprehensive Plan's criteria for being "critically necessary" for the health of the County's environment. Tr. 1644-46. In order to develop such wetlands, in addition to meeting the Comprehensive Plan, a developer had to obtain an Environmental Resource Permit ("ERP") from the Southwest Florida Water Management District ("SWFWMD").

The Clean Water Act and Section 404(b) Permit Requirements for Wetlands

The objective of the Clean Water Act ("CWA") is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 40 C.F.R. § 230.1(a) (2020). The Clean Water Act delegates responsibility to the Army Corps of Engineers to "protect wetlands subject to the Corps' jurisdiction from unnecessary destruction." Deltona Corp. v. United States, 657 F.2d 1184, 1188 (Ct. Cl. 1981); Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1981); see 33 U.S.C. § 1344(d). In recognition of this objective, the CWA prohibits the discharge of dredged or fill material into waters of the United States unless a permit, issued by the Army Corps of Engineers under Section 404 of the CWA, authorizes such discharge. 33 U.S.C. §§ 1311(a), 1344(a).

In deciding whether to approve a Section 404 permit to dredge and fill, the Corps looks to the Section 404(b)(1) guidelines outlined in 40 C.F.R. § 230.10. The intent of the Section 404 permit determination is to ensure that there be "no net loss of functions and values of wetlands." Tr. 969. According to Tunis McElwain, the Chief of the Jacksonville District Corps of Engineers, "wetlands have…functions and values. So functions are things like water retention, flood water retention, or the filtering of water…. Habitat, wildlife habitat is another example of a function. And then values are things like aesthetics and…more general things that wetlands provide." Tr. 971.

Under the Section 404(b)(1) Guidelines, the Corps may only issue a Section 404 permit if it concludes that the proposed project is the "least environmentally damaging practicable alternative." 40 C.F.R. § 230.10(a)(2) (2020). The Corps may not grant a permit if there is a practicable alternative that would have a less adverse impact on the aquatic ecosystem than dredging and filling. 40 C.F.R. § 230.10(a). For non-water dependent projects, the Corps presumes that less environmentally damaging practicable alternatives are available unless clearly demonstrated otherwise. See Tr. 975.

To determine whether a project is the least environmentally damaging practicable alternative, the Corps reviews the project's avoidance, minimization, and mitigation of adverse impacts on the aquatic ecosystem. Tr. 966; see also 40 C.F.R. § 230 (2020). Under the Section 404 program, a potential permittee is first expected to "avoid" deliberate discharge of materials into wetlands, then to "minimize" unavoidable discharge impacts, and finally to effect compensatory "mitigation" of any remaining impacts through restoration, embankment, creation, or, in exceptional circumstances, preservation of other on- or off-site wetlands or aquatic resources. 40 C.F.R. § 230 (2020).

Avoidance is the first step in the Corps' evaluation sequence because there is a presumption that alternative sites are available that would avoid impacts to the waters of the United States completely. Tr. 970. If avoidance is not possible, the Guidelines call for minimization of the impact to the waters, such as changing a site plan configuration to reduce impacts to the higher

quality wetlands. Id. Finally, mitigation entails the replacement of the wetlands' functions that would be lost due to the proposed project's environmental impacts. Tr. 970-71.

Lemon Bay's Permit Applications and the Corps' Responses

Prior to submitting any permit applications, Lemon Bay sought to include a dock on the southern edge of the property which extended into the state-owned Lemon Bay Aquatic Preserve. JX 82. In a pre-application meeting, the SWFWMD informed Lemon Bay that including a dock that was on state sovereign lands in the permit application for the ERP could push the application into the "Heightened Public Concern" category, which would require approval from the Trustees of the Internal Improvement Trust Fund. JX 81 at 1; Tr. 144. Lemon Bay decided to defer requesting the SWFWMD to review the proposed dock until the residential portion of the project was reviewed and approved. Tr. 425-26.

In February 2012, Lemon Bay applied for the required ERP without the contemplated dock. JX 49. On December 20, 2012, the SWFWMD granted Lemon Bay the ERP for a project that did not include a dock, subject to 18 conditions. JX 77. Among these conditions were requirements that manatees and sea turtles be protected from direct project effects. Id. at 7. This permit was set to expire after five years and did ultimately expire on January 5, 2018. JX 77 at 3; JX 112.

In April 2012, Lemon Bay filed an application with the Army Corps of Engineers for a permit to fill approximately 1.95 acres of the submerged aquatic wetlands and construct a 12-unit single-family townhome development.[5] Tr. 28, 987-88; JX 51. In accordance with Corps' policy, the Corps issued a public notice inviting comments on Lemon Bay's proposed fill plan on May 3, 2012. JX 51. In its public notice, the Corps "determined the proposed project may affect, but is not likely to affect" various species of endangered aquatic animals and that "the proposed action would have a substantial adverse impact on [Essential Fish Habitat] EFH." JX 51 at 3-4 (emphasis in original); Tr. 1285. The notice explained that "the Corps [would] request [United States Department of Interior, Fish and Wildlife Service's] and National Marine Fisheries Service's (NMFS) concurrence" with its endangered species determination, and that its "final determination relative to project impacts and the need for mitigation measures [was] subject to review by and coordination with the National Marine Fisheries Service." JX 51 at 3-4.[6]

In response to the public notice, the Corps received over 200 letters from agencies, adjacent property owners and residents in the surrounding area, citing environmental concerns based on, inter alia, Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), Section 404 of the

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[5] Lemon Bay expanded the footprint to 2.08 acres in late 2012. Stip. ¶¶ 51, 82; see JX 51 at 1 and JX 74 at 6.

[6] Beginning in the 1960s, the Corps was obligated by the Fish and Wildlife Coordination Act to consult with the United States Department of Interior, Fish and Wildlife Service (FWS) when it made permit decisions regarding dredging, filling, excavating, and other related work in traditionally navigable waters. Under the Endangered Species Act, which was passed in 1973, federal agencies must consult with the National Marine Fisheries Service when any action of the agency, including permitting, may affect a species listed as threatened or endangered under the Act. See 16 U.S.C. § 1536(a)(2).

Clean Water Act (33 U.S.C. § 1344), and the Endangered Species Act (16 U.S.C. § 1531 et seq.). JX 71 at 3; JX 54, JX 64, JX 65. The comments included a statement from the NMFS that the property was an "Essential Fish Habitat" and should not be filled and a statement from the U.S. Environmental Protection Agency ("EPA") that "the proposed project may have substantial and unacceptable adverse impacts to mangroves." JX 71 at 1.

In May of 2012, a project manager from the Corps conducted an interagency site inspection with a fishery biologist from the NMFS, Mark Sramek, and a biologist from the EPA. JX 55; Tr. 1287-88. They "collectively walked the entire mangrove wetland site, and the purpose was to assess the quality…and quantity of the mangrove habitats, which are identified as essential fish habitat." Tr. 1289; DX 40. In Mr. Sramek's view, the project site contained high-quality, functioning mangrove wetlands. Tr. 1289. Based upon the interagency site inspection, the NMFS reported that the site contained aquatic resources of national importance and "provided an essential fish habitat conservation recommendation" to the Corps. Tr. 1287; 1291-92. Essential fish habitat is "essentially the backbone of the estuarine system," providing protection and forage for endangered and economically important fish species. Tr. 1074-75; see JX 108 at 49-50. The Corps determined that the mangrove wetlands were high-quality wetlands and agreed with the NMFS that they were an essential fish habitat and an aquatic resource of national importance. Tr. 1074.

On October 5, 2012, the Corps provided Lemon Bay with the public comments, and determined that Lemon Bay's proposed project was not water dependent because it did not require access to water as the basic project purpose was to construct homes. JX 71 at 4. As a result of this determination, the Corps requested that Lemon Bay provide an "alternatives analysis" to determine if the proposed project was the least environmentally damaging practicable alternative. Id.; Tr. 1030. The Corps requested Lemon Bay to provide a report "describing the search for the [alternative] sites, identification of their location and rating, and a narrative that shows which site, if any, is the preferred alternative." JX 71 at 4.

The Corps specified that the alternatives analysis should include:

a. A defined set of criteria for site evaluation;
b. A defined system for rating each site against each of the criteria; and
c. A description of the method used to comparatively weigh each rating as to its importance.

Id. The Corps also requested an "on-site alternative analysis," that referenced the set of criteria discussed in the Alternatives Analysis, compared and contrasted the on-site alternative plans, and included: "a. A description of the site plan/configuration; b. A method to estimate the environmental consequences of each plan; and c. A narrative that shows the quantity of fill is the minimum amount practicable." JX 71 at 5.

In response to the Corps' request, Lemon Bay submitted a four-page "Practical" Alternatives Narrative in December 2012, analyzing three alternative sites. JX 79 at 15. Lemon Bay emphasized that "consideration must be made for the fact that the subject parcel was not acquired by the current owner in any form of an open market transaction." Id. Lemon Bay continued:

> [t]o the contrary, the owner had no intentions to acquire this or any similar parcel for real estate developments. The additional explanation below will help clarify why the owner does not have the option to acquire any other similar waterfront property to avoid the impact to the subject site, since any additional purchase would not reduce the cost and financial losses that have already been incurred to date…[T]he borrower defaulted on the loan terms, eventually forcing the lender, and now current owner, to take possession of the parcel through foreclosure to get control of the loan collateral. At this point the new owner had to realize that the total investment in the mortgage and accrued unpaid interest and cost was at risk due to the lack of final approval or permits for the previously proposed development.

Id.

Lemon Bay submitted that avoidance was impossible based on the financial circumstances surrounding its acquisition of the property and addressed minimization and mitigation as follows:

> To mitigate the financial damage and minimize the losses incurred to date the owner has to develop this site making avoidance of onsite wetland impacts impossible. Based on current market research and comparable sales / listings, it was determined that a use of the site as a single family development is the only feasible way to allow for absorption of the site into the market. …
>
> The resulting new development plan minimized the wetland impact to the smallest impact possible while allowing the current owner to recoup the losses that were previously incurred, which still represents a substantial financial risk. However, without approval for the development the owner would de facto be incurring a total loss on this investment that now inadvertently turned into a lengthy and tedious development process. Due to the length of the permitting and approval process the current owner continues to incur additional expenses and loss of interest on the outstanding capital that continue to increase the financial damages. …
>
> However, since avoidance of the impact is not practicable, it was the owner's intention to minimize the impact as far as feasible while also mitigating any damages through the approved mitigation bank/mangrove credits for any losses to the habitat.

JX 79 at 15-16.

Recognizing that mitigation credits purchased from a mitigation bank[7] can be used to offset mangrove wetland impact by providing new or improved habitat for the affected wildlife, Lemon

[7] A mitigation bank is "a site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources." 40 C.F.R. § 230.93 (2021).

Bay acquired credits in the Little Pine Island Mitigation Bank and proposed additional mitigation via conveyance of a three-acre portion of the property to the State of Florida. Tr. 1780.

It is not typical for the Corps to consider property that is not available for purchase in an alternatives analysis because the purpose of the analysis is to identify other sites that could be used for the proposed project. Tr. 1035. Mr. McElwain elaborated, "the site has to be available or potentially capable of being used after taking into consideration cost, existing technology, and logistics in light of the overall purpose." Id. For minimization, after the Corps identifies higher quality wetlands on the site and asks the developer to avoid those wetlands to the extent practicable, the developer typically works with the Corps and "go[es] through iterations of site plans where there's minimization involved." Tr. 1032. In response to the Corps' request for minimization, however, Lemon Bay did not propose any iterations to its site plan. Instead, Lemon Bay said that because Mr. LeFave had received approval for a 39-unit development in 2007, and Lemon Bay's proposed development was only 12 units, it had already minimized impacts to the wetlands and no further minimization was required. See JX 79 at 24.

Finally, Lemon Bay did not address comments from EPA and the NMFS submitted in response to the Corps' May 3, 2012 public notice stating that the project would have substantial and unacceptable adverse impacts on mangroves. JX 65. Instead, Lemon Bay argued that the Corps has sole decision-making authority, and that these agencies should retract their comments. See JX 79 at 2-4.

The Corps critiqued various aspects of Lemon Bay's "Practical" Alternatives Narrative, including Lemon Bay's choice of alternative sites. According to Mr. McElwain, typically when the Corps requests an alternatives analysis, a developer provides an analysis that shows multiple alternative sites and analyzes the presence or absence of wetlands on those sites. See Tr. 1031-32. The applicant then compares these potential sites with its needs. Lemon Bay's Alternatives Analysis, however, included two sites that were not available for purchase at the time and one additional property that was for sale for $1.5 million. JX 79 at 18-23.[8]

On February 14, 2013, Lemon Bay amended its application and proposed a 13-slip dock as part of the development. JX 82. As a result of the dock addition, the Corps published another public notice on April 5, 2013, inviting comments on the proposed development with the dock. JX 86. The public comments in response to the second notice were "virtually the same" as the comments on the first notice. Tr. 1039; see DX 50.

On May 13, 2013, the Corps informed Lemon Bay that the dock would negatively impact the West Indian manatee and was inconsistent with the Endangered Species Act – a situation known as a "take likely." JX 91; Tr. 1044-45. According to Mr. McElwain, the Corps cannot

[8] In response to the Corps' request for Lemon Bay to assess practicable site alternatives, Lemon Bay hired Market America Realty to "conduct a thorough search in Charlotte County for property on the market that would allow [Lemon Bay] to build 12 single family homes on the water." JX 79 at 16. Market America Realty, however, only found three potential alternative sites, two of which had already been sold. Id.

approve a Section 404 permit if there is a "take likely" situation because in order to receive a permit, the project must be in compliance with all federal legislation. Tr. 1047-48.

On May 28, 2013, the NMFS informed the Corps that it had conducted a benthic survey of the area proposed for dock construction to "evaluate the presence and abundance and overall ecological health of the SAV [submerged aquatic vegetation] at the project site," which "provides very high-quality habitat for many commercially and recreationally important fish and invertebrate species." JX 92; Tr. 1298, 1300. Based on the survey, the NMFS determined that the dock project as proposed would have resulted in adverse impacts to essential fish habitat and recommended that the Corps not authorize it. Tr. 1301. In response to the concerns about the West Indian manatee and essential fish habitat that arose because of the dock construction, Lemon Bay amended its application to have the proposed dock include only nine slips. JX 93; Tr. 310-11.

In a letter dated January 3, 2014, the Corps revised the Project Purpose from "residential development in Charlotte County" to "[r]esidential development in coastal southwest Florida with water access to Lemon Bay" given Lemon Bay's request that the Corps evaluate the project with the addition of boat slips. JX 96 at 2. The Corps provided a list of outstanding issues for Lemon Bay to address and again asked Lemon Bay to show why it could not minimize its development's impact by shrinking the footprint or reducing the number of units proposed. JX 96 at 13-14; Tr. 170-71. In addition, the Corps asked Lemon Bay to respond to the FWS' concern about the project's "take of the manatee." JX 96 at 16. Although Lemon Bay had asserted that it could not acquire any other similar waterfront property due to cost, the Corps responded that it "looks at costs from a neutral industry-wide perspective and not an economic perspective to ensure an individual applicant's rate of return." JX 96 at 9.

Regarding minimization, the Corps informed Lemon Bay:

> In order to determine that Lemon Bay Cove LLC has minimized impacts to aquatic resources to the maximum extent practicable, Lemon Bay Cove LLC must clearly demonstrate that alternatives that do not discharge into special aquatic sites are either not practicable or not available.
>
> ***
>
> The Corps has identified several features of the proposed project that could be minimized in order to reduce impacts to aquatic resources. *Please clearly demonstrate why it is not practicable to minimize the following site features. Please include the acreage of wetland impacts that could be minimized in your evaluation.*
>
> 1. *Please clearly demonstrate why it is not practicable to minimize the number of residential units.*
> 2. *Please clearly demonstrate why it is not practicable to reduce the lot sizes.*
> 3. *Please clearly demonstrate why it is not practicable to minimize the number of docks.*
> 4. *Please clearly demonstrate why it is not practicable to minimize the vessel size to a kayak, canoe, and non-motorized vessel or a motorized shallow-draft vessel.*

5. *Please clearly demonstrate why it is not practicable to construct the houses on pilings and reduce the acreage of wetland fill. Please include if any fill is needed for any construction activities such as septic or utility lines.*
6. *Please clearly demonstrate why it is not practicable to minimize the project design to eliminate the residential homes and construct parking spaces adjacent to the roadway and docks with an elevated walkway from the parking spaces to the docks.*

JX 96 at 13-14 (emphasis in original).

On May 3, 2014, Lemon Bay responded to the Corps' request that it demonstrate why it could not minimize its development's impacts. JX 98. Although the Corps advised Lemon Bay that it did not agree with the basis of its proposed evaluation criteria, Lemon Bay did not revise its evaluation criteria. Compare JX 98 at 3 with JX 79 at 16. Lemon Bay wrote that

> [u]nfortunately, there is nothing on the market that will meet all the criteria requirements. Neither of the considered alternatives possess equal frontage or views. Roadway access and deep water access are also limited. Lastly, viability of these sites for residential development would be further reduced due to the current condition and use of the surrounding properties of the alternate sites that are not consistent with the intended use of the subject site, which would result in a significantly reduced value of the finished product, thus rendering the project infeasible.

JX 98 at 3. Lemon Bay replaced two of the three alternative sites but did not provide upland acreage or impacted or non-impacted wetland acreage. JX 98 at 4. In its avoidance narrative, Lemon Bay noted that utilizing the existing site was the most cost-effective for the owner and the Corps because either of the new alternative sites would require an additional $3.8 million or $1.65 million investment. JX 98 at 6.

With respect to the Corps' concerns with its minimization narrative, Lemon Bay reiterated that it "had demonstrated" "why it [was] not practicable to minimize ANY FURTHER the number of residential units" because its "new proposal" represented a 69% reduction in residential units and a 26% reduction in wetland impacts compared to the original plan for a 39-unit development submitted by Mr. LeFave. JX 98 at 10.

On May 28, 2014, the Corps conducted another site visit to Lemon Bay's property to assess the quality and conditions of the mangrove wetlands and quantify their functions. DX 60; Tr. 1071-72. The Corps determined that the property received regular tidal interchange and that the mangrove wetlands were high-quality wetlands and an essential fish habitat and aquatic resource of national importance. Tr. 1074; JX 108; see DX 60.

On January 16, 2015, the Corps told Lemon Bay that it did not provide enough information to demonstrate that the proposed project was the least environmentally damaging practicable alternative and that, based on the information provided, it was unlikely that the Corps would recommend a positive permit determination. JX 101 at 2. In response, Lemon Bay reiterated that "none of lesser environmentally damaging alternatives available in the marketplace having the

same project purpose would be economically practical." JX 104 at 1. Lemon Bay acknowledged that "while there are less environmentally damaging alternatives in the market place, they are too costly." JX 104 at 1. Lemon Bay submitted an updated market research report prepared by Market America Realty, which stated that according to Lemon Bay's own assessment, the proposed site was the least environmentally damaging practicable alternative and the only economically practical option given Lemon Bay's already expended costs. See JX 104 at 1-3. The updated Market America Realty report included the following "Development Exit Scenario" concluding that "[d]evelopment is only financially feasible at 12 sellable units, to avoid potential losses due to cost overruns in development phase" and stating:

Development Exit Scenario

Units	1	2	4	6	8	10	12
total revenue	$ 858,635.00	$ 1,717,270.00	$ 3,434,540.00	$ 5,151,810.00	$ 6,869,080.00	$ 8,586,350.00	$ 10,303,620.00
Lot + Infrastructire cost	$ 3,603,618.70	$ 3,603,618.70	$ 3,603,618.70	$ 3,603,618.70	$ 3,603,618.70	$ 3,603,618.70	$ 3,603,618.70
Cost to build	$ 422,937.50	$ 845,875.00	$ 1,691,750.00	$ 2,537,625.00	$ 3,383,500.00	$ 4,229,375.00	$ 5,075,250.00
Total cost	$ 4,026,556.20	$ 4,449,493.70	$ 5,295,368.70	$ 6,141,243.70	$ 6,987,118.70	$ 7,832,993.70	$ 8,678,868.70
Balance	$ (3,167,921.20)	$ (2,732,223.70)	$ (1,860,828.70)	$ (989,433.70)	$ (118,038.70)	$ 753,356.30	$ 1,624,751.30
% profit	-79%	-61%	-35%	-16%	-2%	10%	19%
Lot Value - as is (cost + lost profit)							$ 3,428,370.00
Summary:	Development is only financially feasible at 12 sellable units, to avoid potential losses due to cost overruns in development phase						

JX 104 at 12.

On February 1, 2016, the Corps denied Lemon Bay's permit application with prejudice having determined that after "carefully consider[ing] all information provided subsequent to the initial submittal of the application," "the proposed project [did] not comply with the Section 404(b)(1) Guidelines and [was] contrary to the public interest." JX 107 at 1. The Corps emphasized that Lemon Bay did not demonstrate that its project was the least environmentally damaging practicable alternative. JX 108 at 76. Lemon Bay filed an administrative appeal on March 29, 2016, and on December 19, 2016, the Corps denied that appeal. JX 109; JX 111. In the instant action, Plaintiff seeks just compensation in the amount of $3,800,000 based upon its experts' valuation of the property but for the denial of the Corps' permit.

Discussion

Legal Standards: Categorical and Regulatory Takings

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. "[A] taking can be accomplished by a physical invasion of the property or by the imposition of a governmental regulation." Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1365 (Fed. Cir. 2004). As Justice Holmes characterized the general rule a century ago, "while property may be regulated to a certain extent, if the regulation goes too far, it will be recognized as a taking." Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In Lucas v. South Carolina Coastal Council, the Court

explained that there could be a taking "where [a] regulation denied all economically beneficial or productive use of the land." 505 U.S. 1003, 1015 (1992).

More recently, in Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, the Court clarified that its Lucas rule on categorical takings was limited to the "extraordinary circumstance where no productive or economically beneficial use of land is permitted." 535 U.S. 302, 330 (2002) (emphasis in original). The Tahoe-Sierra Court characterized a Lucas categorical taking as a "'permanent obliteration of value' of a fee simple estate." Id. For "[a]nything less than a 'complete elimination of value,' or a 'total loss,'" the Court articulated a different analytical framework "that would require the kind of analysis applied in Penn Central." Id. (citing Lucas, 505 U.S. at 1019-20, n.8).

Under Penn Central, courts use a three-factor analysis to assess claimed regulatory takings: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations. Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 124 (1978); Cienega Gardens v. United States, 331 F.3d 1319, 1337 (Fed. Cir. 2003). When an individual alleges a taking by government regulation, the court must conduct an ad hoc, factual inquiry to determine whether the particular circumstances in the case give rise to a regulatory taking. Penn Central, 438 U.S. at 124.

If a "categorical" taking has occurred under Lucas, this ends the taking inquiry, and no Penn Central factual analysis need be performed. Thus, the Federal Circuit has instructed that "it is often important to determine at the outset whether a particular claimed taking was 'categorical' or not." Rith Energy, Inc. v. United States, 247 F.3d 1355, 1362 (Fed. Cir. 2001) (on rehearing).

Was There a Categorical Taking of Lemon Bay's Property?

In order to effect a compensable categorical taking under Lucas, a regulation must deny all economically beneficial or productive use of the land such that "the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle." Lucas, 505 U.S. at 1019 (emphasis in original). Lost Tree Village Corp. v. United States (Lost Tree III), 115 Fed. Cl. 219, 228 (2014) (citing Tahoe-Sierra, 535 U.S. at 330).

Plaintiff argues that the Corps' denial of a permit to fill 2.08 acres of wetlands deprived Lemon Bay of any economically beneficial use of the property, based on the difference in value of its parcel as developed with a Corps permit and undeveloped without it. In so arguing, Lemon Bay relies on the opinion of its appraiser, Linwood Gilbert.[9] PX 14B at 8; PX 53; Tr. 825.

[9] This Court admitted Mr. Gilbert as an expert in the fields of real estate appraisal and valuation. Tr. 769.

In valuing the Lemon Bay property, Mr. Gilbert relied on the expert opinion of Dr. David Depew[10] regarding the permitting process and other cost factors and that of Dr. Henry Fishkind[11] regarding the maximally productive use of the property. See PX 14B at 4. Taking these expert opinions into account, Mr. Gilbert opined that the highest and best use of the Lemon Bay property would be the development of seven single-family lots.[12] Mr. Gilbert then utilized the subdivision approach[13] because there was a lack of comparable sales in the marketplace and determined how quickly the lots would sell and calculated a net cash flow for each future period. Tr. 784-87. Finally, he discounted the net cash flow to present value to determine the current value of the property. Tr. 820.

Specifically, Mr. Gilbert determined that the seven lots would sell for a total of $6,600,000 ($900,000 per lot with the two lots on the end selling for $1 million and $1.1 million due to better views). PX 14B at 71. Mr. Gilbert calculated the site development and improvement costs to be $957,343. PX 53 at 2; Tr. 811-17. Mr. Gilbert added professional fees, real estate taxes, interest, and developer's overhead to bring the total development costs to $1,196,505 and rounded that to $1,200,000. PX 53 at 3. Thus, he determined the net cash flow to be $4,554,165. PX 53 at 4. After discounting to present value using a rate of 8.25%, Mr. Gilbert valued the Lemon Bay property as developed with the permit at $3,793,415 rounded to $3,800,000. PX 53 at 4-5; Tr. 825.

Mr. Gilbert valued the property as undeveloped at $12,500. PX 53 at 8. He opined that since the property "is virtually entirely wetlands," no economically beneficial use or value could exist "without the ability to remove mangroves and fill in a portion of the Property." PX 14B at 37. Based on Mr. Gilbert's opinion, Plaintiff argues that the approximate 99.6 percent diminution in value of the property from $3,800,000 to $12,500 constitutes a categorical taking. In contrast, Defendant contends that the undeveloped property should be valued at $15,200, and that Mr.

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[10] The Court admitted Dr. Depew as an expert in the fields of land use planning and regulation, site design, development and permitting, construction cost estimating, and the creation and utilization of Transfer Density Units ("TDUs") in Florida. Tr. 482.

[11] The Court admitted Dr. Fishkind as an expert in real estate economics and TDUs. Tr. 672.

[12] Highest and best use is "the reasonably probable and legal use of property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value, including those uses to which the property may be readily converted." United States v. Powelson, 319 U.S. 266, 275 (1943); see Otay Mesa Prop., L.P. v. United States, 779 F.3d 1315, 1329 n.4 (2015).

Despite its insistence during the administrative permit application process that it needed a 12-unit project to avoid financial losses, Plaintiff reduced its requested 12-unit project to seven units for purposes of calculating its damages in this litigation. See PX 14B; Tr. 437-548 (Depew); Tr. 672-709 (Fishkind); Tr. 759-832 (Gilbert).

[13] The subdivision approach employs aspects of the three major approaches to valuation: the sales comparison approach, the cost approach, and the income capitalization approach and estimates the value of the residential lots that could be developed on the property and the costs of developing those lots and subtracts the costs from the lot sale value. Tr. 786-87.

Gilbert inflated the value of the property as developed by overestimating the per-lot value at $900,000 when it should have been $399,000 per lot. Def.'s Post-Trial Br. at 10-11, 72.

Setting aside the parties' dispute about the valuation of the property in its developed or undeveloped state, there is a more fundamental issue about the nature and scope of the taking that dictates whether the alleged taking can be deemed "categorical." Defendant argues that Plaintiff has not established a categorical taking that rendered Plaintiff's property totally without value because Plaintiff never attempted to develop its property by proposing a smaller footprint or fewer units to minimize the adverse environmental impacts. Plaintiff, however, contends that Corps representatives advised Lemon Bay that the Corps would never have granted Lemon Bay any permit to develop this property. Lemon Bay argues that Tunis McElwain, Chief of the Corps' Jacksonville District and Defendant's Rule 30(b)(6) representative, orally stated that the Corps would deny Lemon Bay any permit to fill the property. Tr. 187; see Tr. 702. The evidence of record, however, does not bear out Lemon Bay's contention.

Plaintiff Has Not Established That the Corps Denied All Potential Development of Plaintiff's Land

Mr. Goertz testified that in 2012, at the first meeting between Lemon Bay and the Corps after Lemon Bay submitted its permit application, Mr. McElwain told Lemon Bay that the Corps would never allow any development on the property. Tr. 79 ("[I]t was Tunis McElwain, he approached us immediately and said that they [would] never give us a permit to move forward on the property."). Despite these alleged statements from the Corps as far back as 2012, Mr. Goertz and Lemon Bay continued to engage in the permitting process until 2016, when the permit was ultimately denied. Tr. 187-89.

Mr. Dinkler, Plaintiff's expert in wetland ecology and permitting, who previously worked for the SWFWMD, testified that "in almost every meeting that [Lemon Bay] had, [it was] instructed that the Fort Myers office didn't approve projects that impacted mangroves." Tr. 300. He continued, that "if there were any phone or meetings with other agency staff, [Lemon Bay was] told that [it] would be asked questions until [it] went away." Id.[14] According to Mr. Dinkler, these statements primarily "came from Tunis McElwain, who at the time was the . . . overall manager for the Fort Myers office" and Susan Waichulis, the Corps' project manager, who made it clear "that it was going to be a very steep hill and almost impossible to climb past." Tr. 301.

On cross-examination, Mr. Dinkler acknowledged:

> Q: COUNSEL FOR DEFENDANT: So . . . Mr. McElwain did not state that the Corps would never let Lemon Bay Cove impact any wetlands on its property. Is that right?
>
> A: MR. DINKLER: I did not hear him say that specifically, but he did say that

[14] Mr. Dinkler was both a fact and expert witness for Plaintiff. As principal of Ecological Services Associates, Mr. Dinkler assisted Lemon Bay in permitting its project in Charlotte County. Tr. 266. The Court admitted Mr. Dinkler as an expert in wetland ecology and local, state, and federal wetland and submerged lands permitting. Tr. 265.

they rarely, if ever, permit mangroves out of the Fort Myers office.

Tr. 403.

Mr. McElwain denied telling Lemon Bay representatives that the Corps would never grant Lemon Bay a permit and testified that on 12 occasions between 2008 and 2018, the Corps issued permits for developments with mangrove impacts in the Charlotte Harbor estuary area. Tr. 983-84; 1086-87. Specifically, Mr. McElwain testified:

> Q: COUNSEL FOR DEFENDANT: And did you tell any representative of Lemon Bay that they could never be approved for any development on the property?
>
> A: MR. MCELWAIN: No, I didn't say that. I -- when I took this job, I took an oath to uphold the Constitution, and due process is part of that, part of the Constitution, and review of the permit application is due process. So I -- that's not something I would say."

Tr. 1087. Mr. McElwain further testified:

> Q: Can you tell us how many times the Corps issued permits for mangrove impacts in the Charlotte Harbor estuary area between 2008 and 2018?
>
> A: Twelve times.

Tr. 983-84.

Ian Vincent, Defendant's expert in environmental permitting and environmental land use approval in Southwest Florida, including Charlotte County, testified that he "absolutely did not believe" that "Charlotte County would never allow development of this property" as "there certainly [was] nothing in their comprehensive plan policies that [he] reviewed that absolutely would preclude development." Tr. 1706.

Plaintiff did not adduce any contemporaneous documentary evidence of the Corps advising Lemon Bay that it would be denied any permit whatsoever, as illustrated by the following exchange:

> Q: COUNSEL FOR DEFENDANT: I'd just like to ask, Mr. Goertz, did you make any notes of the meeting with Mr. McElwain in which you claim that he told you that Lemon Bay would never be permitted to develop the site?
>
> …
>
> A: MR. GOERTZ: I'm sure I did.
>
> Q: Okay. And have those notes been produced to the United States?
>
> A: Nope.
>
> Q: Those notes were not produced to the United States in connection with this

case?

A: No, no written -- no written notes.

Q: But do you have written notes of the meeting at which Mr. McElwain allegedly told you that no permit would be developed?

A: No, not anymore.

…

Q: Is there any written record that you have of the statement that Mr. McElwain allegedly made regarding development of the Lemon Bay site?

A: No, nope, nope. I think only the witnesses in the room.

Tr. 162-63.

In voluminous correspondence spanning several years, the Corps asked Lemon Bay for further information to demonstrate compliance with the Section 404 Guidelines, but did not reject any and all potential development. JX 71; JX 96; JX 101; Tr. 187-89. The Corps repeatedly notified Lemon Bay that its proposed 12-unit project was not the least environmentally damaging practicable alternative and requested that Lemon Bay provide further information on possible avoidance (alternative development sites) and minimization (alternative site plans with a smaller impact to the wetlands) as required by the Section 404 guidelines.

In its October 5, 2012 letter, the Corps cautioned Lemon Bay that it needed to show that practicable alternatives were unavailable and that its proposed onsite fill was the minimum necessary. JX 71. Plaintiff, however, chose not to amend its permit application to attempt to meet the Corps' concerns. JX 79. Instead, Lemon Bay reiterated that because the previous owner, Mr. LeFave, had received preliminary approval for a 39-unit project from Charlotte County in 2007, and Lemon Bay was proposing only 12 units, the project had already achieved the requisite minimization. JX 79 at 24. Lemon Bay stressed that it could not reduce the project any further because the 12-unit project was "the breaking point for an economically viable project," and that it had to "mitigate the financial damage and minimize the losses incurred to date" and develop this site "making avoidance of onsite wetland impacts impossible." JX 79 at 24.

Although in early 2013, Lemon Bay added a dock in the Lemon Bay Aquatic Preserve to its plans and submitted that it made the project water-dependent, the Corps disagreed that the dock converted the project to water-dependence, and informed Lemon Bay that the 13-slip dock would result in more adverse impacts and a "take" of the West Indian Manatee, which the Endangered Species Act and Marine Mammal Protection Act prohibit. Tr. 165-67, 1040, 1044-46; Stip. ¶ 97. Lemon Bay reduced the dock from 13 to nine slips, but the Corps concluded that the nine-slip dock was still "likely to result in [a] take of the manatee." JX 93; JX 101 at 1.

In correspondence between 2014 and 2015, the Corps provided a list of outstanding issues, asking Lemon Bay to show why its development could not be minimized by shrinking the footprint or reducing the number of units proposed, and to clarify the extent of wetlands onsite. Tr. 170-71, 1060, 1061-65; JX 96 at 6, 9, 13-14. But in response, Lemon Bay did not suggest any minimization

of the project footprint or reduction in the number of units, reiterating that the project was already minimized from Mr. LeFave's original project proposal, and that it needed to recoup the loss on LeFave's defaulted loan by developing the property in a financially feasible way -- 12 single-family homes "given Lemon Bay Cove's sunk costs in the land." JX 103 at 1; see also Tr. 177-80, 1066-67, 1079-80; JX 98; JX 104 at 12.

The Corps' ultimate denial decision was limited to the discrete permit that Lemon Bay had sought -- a permit to fill 2.08 acres of high quality tidal forested mangrove wetlands to construct a 12 single-family unit residential development, not any conceivable potential development of this land. See JX 108 at 45; JX 111 at 25. Plaintiff suggests that the Corps' denial of Lemon Bay's application "with prejudice" indicates that the Corps would never approve any permit for Lemon Bay to fill the property. However, the only application that the Corps denied with prejudice was the application to fill 2.08 acres and construct 12 units.

In sum, in correspondence spanning 2012-2015, the Corps requested avoidance, minimization, and mitigation, but Lemon Bay refused to propose the requested less environmentally damaging development scenarios or alter the parameters of its proposed project for its own financial reasons. See e.g., JX 71; JX 79; JX 91; JX 93; JX 96; JX 98; JX 101; JX 103. As such, the record as a whole does not support Plaintiff's contention that the Corps advised Lemon Bay that it would never grant any permit no matter what the acreage or number of units. Plaintiff did not prove that the Corps' denial of its permit for a 12-unit project deprived the property of all economic value as required to establish a categorical taking.

This Case Is Distinguishable from Lost Tree Village

Plaintiff further argues that this case is essentially identical to Lost Tree Village where the courts determined that the denial of a Corps' permit effected a categorical taking. Tr. 2201-05. However, the issue in Lost Tree Village was defining the parcel, not the scope and parameters of the requested permit. In Lost Tree Village, the landowner sought a Section 404 permit to fill a previously platted parcel consisting of mangroves, swamp, and wetlands, Parcel 57, and develop a residential home site, and the court looked to a neighboring plat and scattered wetlands within the community to define the relevant parcel. Lost Tree Village I, 100 Fed. Cl. at 424-25. The Court of Federal Claims found no regulatory taking because the denial of the permit for the two plats and scattered wetlands only diminished the value of this parcel by some 58.4%, an insufficient economic loss under Penn Central. 100 Fed. Cl. at 439. On appeal, the Federal Circuit found that the trial court erred in defining the relevant parcel by aggregating the two parcels and the scattered wetlands, and instructed that when determining whether a categorical taking has occurred, the court must look only to Parcel 57 because Lost Tree Village had treated Parcel 57 as a separate economic unit. Lost Tree Village v. United States, 707 F.3d 1286, 1294 (Fed. Cir. 2013). On remand, the trial court found that considering the single plat, the denial of a permit by the Corps caused a diminution in value of 99.4% and amounted to a categorical taking because it denied Lost Tree Village all economically beneficial or productive use of the land in that parcel. Lost Tree Village III, 115 Fed. Cl. at 231; accord Palm Beach Isles Assoc. v. United States, 208 F.3d 1374, 1381 (Fed. Cir. 2000).

There was no suggestion in Lost Tree Village, as there is here, that the denial of the permit was based on a use-specific application that the landowner could have altered to minimize adverse

environmental impacts. Here, the Corps denied Lemon Bay a permit to fill 2.08 acres and build a 12-unit project, and invited Lemon Bay to amend its permit application to encompass a development of lesser size and impact. Plaintiff's persistence in limiting its proposed development to a 12-unit footprint for its own financial reasons prevented the Corps' consideration of any other economically viable uses of the property. Because Plaintiff has failed to establish that the Corps' denial of Plaintiff's Section 404 permit application for a 12-unit development obliterated all value of the property, Plaintiff has not established a categorical taking. Mehaffy v. United States, 499 F. App'x 18 (Fed. Cir. 2012).

Defendant's Alternative Ground for Denying a Taking: The Economic Value of Plaintiff's Potential Perfection and Sale of Transfer Density Units

Defendant posits an alternative ground for denying Plaintiff's categorical taking claim submitting that there is an economic use for Lemon Bay's land in the potential perfection and sale of its estimated Transfer Density Units ("TDUs"). The Pacific Legal Foundation's amicus brief explains the Charlotte County TDU program:

> Like similar schemes employed by municipalities across the nation, TDUs utilize market mechanisms to facilitate a more optimal distribution of development rights. Arthur C. Nelson et al., The TDR Handbook: Designing and Implementing Transfer of Development Rights Programs xiv. In particular, Charlotte County's program "shifts residential density from areas where it is inappropriate . . . to areas where [it is] more appropriate." Transfer of Density Units (TDU), Charlotte County, Florida Government Portal. It does so by identifying "sending zones," i.e. areas to be made less dense, and "receiving zones, areas where density is added." Id. County zoning ordinances determine the number of residential dwelling units permitted per gross acre of land. Comprehensive Plan: Future Land Use Appendix III at 6. Each additional "increment" of permitted housing constitutes a "density unit." Id. Property owners in sending zones can "sever" unused density units from the land by entering a perpetual covenant to restrict the use thereof. Charlotte Cty. Muni. Code § 3-9-150(b), (f). This creates "density credits" which can then be sold to property owners in receiving zones. Charlotte Cty. Muni. Code § 3-9-150(b). For the receiving property owners, these credits operate as exemptions from otherwise applicable density limits.

ECF No. 98-1 (Br. Amicus Curiae of Pacific Legal Foundation) at 4-5.

Plaintiff vigorously disputes that the potential perfection and sale of its estimated TDUs to third parties represents an "economic use" for purposes of a taking because the perfection of TDUs requires the property to remain in its natural undeveloped state. According to Plaintiff, selling TDUs would yield income to a landowner, not from cultivating or developing its property in the traditional framework of property ownership but from a regulatory construct -- a devised market -- which requires that the owner's land be kept vacant and idle in order to allow someone else's land to be developed in its stead. For this swap in development rights, the owner would receive a monetary payment based on the nonuse of its property. Defendant, on the other hand, ascribes a valuation of between $504,000 and $630,000 to Plaintiff's potentially marketable TDUs, which it claims establishes an economic value for Plaintiff's property in its undeveloped state.

The parties dispute whether the potential perfection and sale of Plaintiff's TDUs can be considered in determining whether a taking has occurred. In debating the propriety of considering TDUs in the taking context, the parties attribute different interpretations to the existing caselaw -- a dispute which raises a thorny legal issue.[15] In the instant case, the record is insufficient for this Court to resolve the threshold factual issue of whether the potential perfection and sale of Plaintiff's estimated TDUs had economic value, and, if so, what that value was.[16] Thus, the Court does not reach Defendant's alternative ground for challenging Plaintiff's categorical taking claim.[17] In any event, reaching this issue is unnecessary here given the Court's conclusion that Plaintiff failed to establish that the Corps' permit denial deprived Lemon Bay of all economic use of its property. If Defendant had prevailed on its alternative argument, it would merely have

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[15] Plaintiff and the amici rely on Justice Scalia's concurrence in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 747 (1997) (Scalia, J., concurring in part and concurring in the judgment, O'Connor, J. and Thomas, J. joining) ("TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) 'attached.' The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land. The latter is valuable, to be sure, but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking.... Just as a cash payment from the government would not relate to whether the regulation 'goes too far' (i.e., restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; so also the marketable TDR, a peculiar type of chit which enables a third party … to use his land in ways the government would otherwise not permit, relates not to taking but to compensation.") (emphasis in original).

On the other hand, Defendant focuses on language in Penn Central and cases construing that language. See Penn Central, 438 U.S. at 137 (stating that "while these rights [TDRs] may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burden the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation"); Deltona Corp. v. United States, 657 F.2d 1184, 1192, n.14, 228 Ct. Cl. 476, 490, n. 14 (1981) (despite the frustration of the plaintiff's reasonable investment-backed expectation by the statutes and regulations at issue, plaintiff's "residual economic position [was] very great" in part because it possessed TDRs, which "mitigate whatever financial burdens the law imposes"); Good v. United States, 39 Fed. Cl. 81, 108 (1997), aff'd, 189 F.3d 1355 (Fed. Cir. 1999) (stating that "the concurring opinion in Suitum underscores the Court's reaffirmance of the Penn Central holding that the value of TDRs is to be considered to answer the threshold question of whether a taking has occurred.").

[16] The Court finds the opinion and testimony of Defendant's expert on the estimated valuation of the potential perfection and sale of Plaintiff's TDUs to be unpersuasive. See Tr. 1319-1512; DX 72; JX 141. Defendant failed to establish a sufficient factual predicate or indicia of the reliability of the expert's pricing of individual TDU transactions that were the basis for his valuation opinion. See Tr. at 1424-45, 1447-49, 1466-73, 1479-81; DX 72 at 2, 14; JX 141.

[17] The Court also cannot determine on this record whether the perfection and sale of Plaintiff's estimated TDUs have economic value in the context of assessing the Penn Central factors.

bolstered this conclusion by demonstrating that the property could potentially have retained beneficial economic value by generating marketable TDUs.

Regulatory Taking of Lemon Bay's Property under Penn Central

Alternatively, Plaintiff alleges a regulatory taking of its property under Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978). In the context of a Penn Central analysis, whether a given regulation goes "too far" in imposing a burden on a landowner and warranting compensation under the Fifth Amendment is determined by an "ad hoc, factual inquiry." Cienega Gardens, 331 F.3d at 1337 (citing Penn Central, 438 U.S. at 124). The Penn Central three-factor analysis considers (1) the extent to which the regulation interfered with distinct investment-backed expectations, (2) the character of the governmental action, and (3) the economic impact of the regulation on the claimant. Id. Using this factual inquiry, this Court must determine whether the Corps' denial of a permit to Lemon Bay to fill its property constitutes a taking that requires just compensation.

Reasonable Investment-Backed Expectations

Lemon Bay claims that it invested $891,078.02 in its property, representing its member I.H.T.'s loss on the defaulted loan, plus $400,000 that Lemon Bay expended "in attempting to permit the property." Pl.'s Post-Trial Br. at 34. Defendant argues that Plaintiff's reasonable investment-backed expectations equate to either the $10 Lemon Bay paid to I.H.T. for the property in 2011, or I.H.T's $15,200 payment at the foreclosure sale in 2010.

"[T]o support a claim for a regulatory taking, an investment-backed expectation must be 'reasonable.'" Cienega Gardens, 331 F.3d at 1346 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984)). The test for whether investment-backed expectations are reasonable is an objective one. Cienega Gardens, 331 F.3d at 1346. "The subjective expectations of the [plaintiff] are irrelevant. The critical question is what a reasonable owner in [plaintiff's] position should have anticipated." Chancellor Manor v. United States, 331 F.3d 891, 904 (Fed. Cir. 2003). "A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need." Ruckelshaus, 467 U.S. at 1005. "[T]he timing of the purchase and knowledge of the purchaser are relevant considerations in determining whether a purchaser had reasonable investment-backed expectations with which the government's regulatory action interfered." Anaheim Gardens, LP v. United States, 953 F.3d 1344, 1350 (Fed. Cir. 2020) (citations omitted).

"In the context of the Penn Central balancing test, the complete absence of reasonable distinct investment-backed expectations can weigh sufficiently heavily to be dispositive of a takings claim." Id. at 1351 (citing Ruckelshaus, 467 U.S. at 1005). A property owner who acquires land with knowledge of a regulatory restraint "could be said to have no reliance interest or to have assumed the risk of any economic loss." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994); Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994).

Here, as Plaintiff was aware, the Corps' requirement that it obtain a Section 404 permit was a longstanding regulatory restraint that impacted potential development of its property. In 2008, when I.H.T. made the loan to Mr. LeFave secured by the property, and in 2011, when I.H.T. both acquired the property at the tax sale then sold the property to Lemon Bay, this requirement

was in place. When I.H.T. acquired the property, Plaintiff's members were aware that it would not be easy to obtain permits. Tr. 125 ("Yes, we were aware, not at each level, but we were aware about the red flags that Mr. LeFave had to work on."). As the Federal Circuit recognized in Anaheim Gardens, "it is particularly difficult to establish a reasonable investment-backed expectation" if the property was acquired after the alleged regulatory restriction. 953 F.3d at 1350 (quoting Norman v. United States, 429 F.3d 1081, 1092-93 (Fed. Cir. 2005)).

Plaintiff argues that takings claims are "not barred by the mere fact that . . . title was acquired after the effective date of the state-imposed restriction." Lost Tree Village I, 100 Fed. Cl. 412, 437-38 (2011) (citing Palazzolo, 533 U.S. at 633) (internal citations omitted), rev'd on other grounds, 707 F.3d 1286 (Fed. Cir. 2013). Under the Section 404 regulatory regime, however, an applicant's knowledge of the Clean Water Act's restrictions and the need to obtain regulatory approval to fill wetlands, can be a significant factor preventing a finding of reasonable investment-backed expectations. See Norman v. United States, 429 F.3d at 1093 (finding no reasonable investment-backed expectation because plaintiff knew of the wetland restrictions and acquired the property "with full knowledge that portions of it were not subject to development"); Good, 189 F.3d at 1361-62 (recognizing that "[i]n view of the regulatory climate that existed when appellant acquired the property, he could not have had a reasonable expectation that he would receive approval to fill ten acres of wetlands in order to develop the land."). "To hold otherwise would turn the Government into an involuntary guarantor of the property owner's gamble that he could develop the land as he wished despite the existing regulatory structure." Mehaffy v. United States, 102 Fed. Cl. 755, 765 (2012), aff'd, 499 F. App'x 18 (Fed. Cir. 2012) (quoting Forest Props., Inc. v. United States, 39 Fed. Cl. 56, 76-77 (1997)). In Mehaffy, the court found that the plaintiff had both constructive and actual knowledge that federal regulations could ultimately prevent him from developing his land, and "did not have a reasonable, investment-backed expectation that he could develop the property without being subject to the permitting requirements of the [Clean Water Act]." Mehaffy v. United States, 499 F. App'x at 22. Here, as in Mehaffy, Plaintiff did not prove that it had a reasonable investment-backed expectation in developing its wetland property without being subject to the regulatory permitting requirements.[18]

Character of the Governmental Action

In determining the character of the governmental action, a reviewing court must consider the purpose and importance of the public interest reflected in the regulatory imposition. Under the Clean Water Act, the Government is required to protect and prevent damage to the waters of the United States, including the type of wetlands on Plaintiff's property. It is undisputed that

[18] In addition to its knowledge of the regulatory hurdles undercutting its reasonable investment-backed expectations, Plaintiff did not establish that its reliance on a single appraisal that I.H.T. received in 2007, valuing the property as developed at $4,470,000, created a reasonable expectation of the value of the property within the meaning of Penn Central. PX 12 at 23. This appraisal was subject to the owner receiving requisite permits, the preparer of the appraisal did not testify at trial, and the appraisal itself was not admitted as evidence of the truth of its contents, but only for the limited purpose of demonstrating that I.H.T. relied on it in making the loan. Tr. 62-64; PX 12 at 4, n.1. There is no evidence establishing the bona fides of the appraisal, and Plaintiff has not established that the appraisal's valuation of the property was accurate, or that I.H.T.'s reliance on the appraisal was reasonable.

Plaintiff's property contains Category I wetlands and mangroves. Tr. 135-36. According to Mr. Sramek, a biologist from the NMFS, the property "contains overall high-quality, functioning mangrove wetlands," and there was "very little anthropogenic or human use evidence that the mangroves had been impacted." Tr. at 1289-90. Further, the property was designated as an essential fish habitat and an aquatic resource of national importance. See JX 55.

Courts have consistently held that the Clean Water Act's Section 404 program serves a legitimate public purpose in preventing harm to environmental resources such as wetlands. Mehaffy, 102 Fed. Cl. at 768 (The Corps' section 404 permitting regime "is designed to protect and preserve the nation's wetlands."); Brace v. United States, 72 Fed. Cl. 337, 356 (2006) ("[T]he United States has a legitimate public welfare obligation to preserve our nation's wetlands.").

In assessing the character of the governmental action, "a court [must] balance the liberty interest of the private property owner against the Government's need to protect the public interest through imposition of the restraint," and determine whether a burden benefitting the public was "placed disproportionally on a few private property owners." Cienega Gardens, 331 F.3d at 1337-38 (citing Loveladies Harbor, 28 F.3d at 1176). A landowner plaintiff will prevail only when the burden on the landowner is "so substantial and unforeseeable" that it must instead be borne by the public. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984).

While the governmental action here -- the permit denial -- leaves Plaintiff unable to effect what it considered to be the only profitable development of its property and imposes a burden, Plaintiff has not demonstrated that this burden is "so substantial and unforeseeable" that it must be borne by the public. Kirby Forest, 467 U.S. at 14. In Plaintiff's view, the permit denial created a substantial burden because it prevented it from developing 12 single-family units that it needed to make the site an economically viable project. JX 104 at 12. However, Lemon Bay's economic dilemma stems from its member's pre-existing financial outlay on I.H.T.'s defaulted loan and its resultant inability to minimize the project's impact on wetlands by reducing the number of units or footprint. This burden, caused in part by circumstances of Plaintiff's own making, cannot be deemed so "substantial" in a takings analysis that it must be borne by the public.

Nor was the regulatory landscape requiring Lemon Bay to obtain the Section 404 permit "unforeseeable." The Section 404 Guidelines were in effect decades before Lemon Bay sought its permit and provided that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." Forest Prop., Inc. v. United States, 177 F.3d 1360, 1363 (Fed. Cir. 1999) (quoting 40 C.F.R. § 230.10(a) (1988)). Because of these restrictions on development resulting from the Section 404 permitting regime, as the Federal Circuit explained, "few, if any, dredge or fill permits will be granted for the construction of housing." Id.; see Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1547 (Fed. Cir. 1994); Good v. United States, 189 F.3d 1355, 1359 (Fed. Cir. 1999). As such, the burden that Plaintiff experienced due to the permit denial was foreseeable. In sum, the character of the governmental action weighs in favor of Defendant.

Economic Impact

This factor requires "that plaintiffs show 'serious financial loss' from the regulatory imposition in order to merit compensation" and is "intended to ensure that not every restraint

imposed by the government to adjust the competing demands of private owners [will] result in a takings claim." Cienega Gardens, 331 F.3d at 1340 (citing Loveladies Harbor, 28 F.3d at 1177). "Proving economic loss requires a plaintiff to show what use or value its property would have but for the government action." A&D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1157 (Fed. Cir. 2014). Plaintiff argues that its economic loss should be measured by the difference in value of the property without a Section 404 permit, $12,500, a nominal value, and the value of the property with the permit, $3,800,000.

Defendant argues that Plaintiff's valuation of its property but for the denial of the Corps permit hinges on the assumption that the property is readily convertible for residential use, an assumption that is unwarranted because Lemon Bay did not receive all federal, state, and local permits required for developing the property. ECF No. 167 at 46. In addition to the Section 404 permit from the Corps, Lemon Bay needed an ERP from the SWFWMD, the state of Florida water management district, and approval from Charlotte County on compliance with its Comprehensive Plan and land development regulations.

In order to get an ERP, Plaintiff had to show that the project would not be harmful to water resources or violate state water quality standards, and not be contrary to the public interest. See Fla. Stat. Ann. § 373.414(1) (West 2020). According to Hugh Dinkler, an environmental scientist retained by Lemon Bay to obtain the ERP and "future state sovereign lands authorization" for the multi-slip dock, the proposed project met all criteria for an ERP. Tr. 266. On December 20, 2012, Plaintiff had been granted an ERP from the SWFWMD for the project without a dock. JX 77 at 1. Although Plaintiff's experts opined that Lemon Bay would likely have been able to lease land from the state and include a dock, they acknowledged that no federal, state, or local regulatory authority had authorized construction of a dock on the subject property. See Tr. 282-84, 325-26, 552, 842; PX 1 at 10; Stip. ¶¶ 78, 111. Lemon Bay never amended its ERP application to the SWFWMD to reflect the addition of the dock, and Lemon Bay's ERP, without a dock, ultimately expired on January 5, 2018. Based on the record of Plaintiff's dealings with the SWFWMD and the expert testimony, the Court finds that Plaintiff did not demonstrate by a preponderance of the evidence that it would have been able to obtain an ERP from the state of Florida water management district.

Nor has Plaintiff demonstrated that it would have obtained approval of its site plan from Charlotte County. Plaintiff's land use planning and regulation expert, Dr. Depew, opined that because the LeFave site plan had received preliminary approval from Charlotte County, Lemon Bay would have also received such approval. Tr. 523-25. Dr. Depew dismissed the detailed conditions that had to be addressed before final approval, as "nothing out of the ordinary." Tr. 525. He opined that both the LeFave 39-unit site plan and Lemon Bay's seven-unit site plans would have been approved after providing unexplained "engineering details." Tr. 526, 531-33; see also PX 1 (Depew Report).

Defendant's expert in environmental permitting, Ian Vincent,[19] opined that the fact that the LeFave plan received preliminary ERP approval did not increase the likelihood that Charlotte

[19] The Court admitted Mr. Vincent as an expert in the fields of environmental permitting and the environmental components of local land use approvals in Southwest Florida, including Charlotte County. Tr. 1570.

County would approve either the Lemon Bay 12-unit or seven-unit plans. Tr. 1649-50. The Court credits the testimony of Mr. Vincent that Lemon Bay would not have received site plan approval from Charlotte County, based on his review of the Charlotte County Comprehensive Plan's environmental and coastal planning goals, the Manasota and Sandpiper Key Zoning Overlay District regulations, as well as the history of Mr. LeFave's and Lemon Bay's applications to the SWFWMD and the Corps. DX 73 at 17; Tr. 1615-16, 1644-47. Mr. Vincent opined that both Lemon Bay's original 12-unit plan and Dr. Depew's subsequent 7-unit plan were inconsistent with the County's Environmental Policies 3.1.3, 3.1.5, and 3.1.8, Coastal Planning Policies 1.1.2, 1.1.3, 1.1.4, 1.1.5, and 1.1.9, and the no-fill provision of the Manasota and Sandpiper Key Zoning Overlay District. Tr. 1681-1705; see also JX 44. These policies provide for the limitation of impacts on Category I wetlands where no feasible and practicable alternative exists that will permit a reasonable use of the land. See Tr. 1671. Mr. Vincent testified that the county would require a wetland avoidance and minimization discussion, and that Lemon Bay had made "no effort…to justify why a development footprint of two acres of…Category I wetland impact was necessary." Tr. 1672-73; see also Tr. 1687-88, 1691-92, 1696, 1735.

According to Mr. Vincent, Lemon Bay's plan was inconsistent with Coastal Planning Policies because it "propose[d] the removal of approximately two acres of mangroves, along with the construction of a dock in an aquatic preserve," which would "adversely impact the environmental integrity of natural resources" and because Lemon Bay's proposed development was habitat for some of the protected species of flora and fauna, such as the smalltooth sawfish. Tr. 1693, 1697.

The Manasota and Sandpiper Key Zoning Overlay District provides that Sandpiper Key is "a no-fill area within which only pilings and stem walls may be used for all construction, except the minimum amount of fill necessary within the building footprint and for drainfields associated with onsite water treatment and disposal systems." Tr. 1698-99. According to Mr. Vincent, Lemon Bay's plan was inconsistent with this no-fill provision because the proposed fill extended "well beyond the building footprint and associated drainfields." Tr. 1699.

Mr. Vincent opined that the preliminary approval of the LeFave site plan did not mean that the Lemon Bay site plan would have been approved, pointing out that the LeFave plan had been approved using the 1997 version of the Comprehensive Plan which had less onerous requirements for approval than the applicable 2005 version. Tr. 1646-49. Ms. Jaime Scudera, an environmental specialist for Charlotte County in the zoning division that reviewed development applications testified that the preliminary site plan approval is "incredibly easy" to obtain and is essentially just a mechanism to obtain a list of conditions that need to be met in order to obtain final approval. Tr. 1235, 1241, 1245-48. Based on Mr. Vincent's and Ms. Scudera's persuasive testimony, the Court finds that Lemon Bay has not demonstrated that it would have been able to obtain final site plan approval from Charlotte County.

While it is obvious that Plaintiff's property would be far more valuable if it were a residential development rather than unspoiled wetlands, Plaintiff has not established financial loss attributable to the Corps' denial of its permit application, given its failure to prove that it would have obtained the necessary ERP from the SWFWMD and site plan approval from Charlotte County. Thus, the economic impact factor weighs in favor of the Government.

Statutory Right to Bulkhead and Fill Under Florida Law

Lemon Bay alleges that the Corps' denial of its Section 404 wetland permit application amounts to a taking of its statutory right to bulkhead and fill its property under Florida law because the right to bulkhead and fill submerged wetlands is a property right that is appurtenant to and runs with its title to the property. Even assuming that Plaintiff does have a statutory right to bulkhead and fill its property under Florida law and that that right runs with its title to the property, this does not resuscitate Plaintiff's failed takings claim or operate to confer a separate basis for takings liability. As the Government points out, Plaintiff's state-law conferred entitlement to bulkhead and fill cannot be segregated from its bundle of rights associated with ownership of property for a takings analysis. "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Penn Central, 438 U.S. at 130.

Even if Plaintiff demonstrated a vested right under state law to bulkhead and fill its property, a restriction of that right via the denial of a federal permit to fill wetlands would not be determinative of a federal taking claim. Good v. United States, 39 Fed. Cl. 81, 98 (1997), aff'd, 189 F.3d 1355 (Fed. Cir. 1999) ("[E]ven if plaintiff were able to demonstrate the existence of such a vested right under state law, a federal restriction on that state right would not demonstrate the federal restriction to be a taking." (citing Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1073 (11th Cir. 1996) (denial of permission to build project to which developer holds vested right does not by itself establish takings liability)).

Conclusion

Plaintiff has failed to demonstrate either a Lucas categorical taking or a Penn Central regulatory taking. The Clerk is directed to enter final judgment in favor of Defendant.

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Senior Judge

In the United States Court of Federal Claims

No. 17-436 L
Filed: July 15, 2022

LEMON BAY COVE, LLC

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Post-Trial Opinion, filed July 15, 2022,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. Pr. 32(a)(7)(B) and Fed. Cir. R. 32(b)(1) by consisting of 13,482 words. This brief also complies with the typeface and type-style requirements of Fed. R. App. Pr. 32(a)(5)-(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ David Smolker

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2023, I electronically filed the foregoing motion with the Clerk of the Court for the Federal Circuit Court of Appeal by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. Defendant's counsel was also notified of this motion by email.

/s/ David Smolker