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 REPLY BRIEF

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May 9, 2023

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

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: 5/09/2023

Signature: /David Smolker/

Name: David Smolker

FORM 9. Certificate of Interest

Form 9 (p. 2)
July 2020

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
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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).

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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).

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ARGUMENT

I. THE CFC ERRONEOUSLY CONCLUDED THE CORPS' PERMIT DENIAL DID NOT CONSTITUTE A *LUCAS* TAKING

A. The Government Mischaracterizes The Burden of Proof Under Lucas

The test to determine a *Lucas* taking is whether a government's regulatory act requires a landowner to leave his property "economically idle," or "denies all economically beneficial or productive use of land." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1019 (1992). The Government incorrectly and repeatedly asserts that the speculative possibility of the Corps approving a smaller fill footprint removes this case from a *Lucas* taking. Answ. Br. 21. The Government infers that Lemon Bay's property (the "Property") may retain some value despite the permit denial because the Corps only denied Lemon Bay's "preferred project" and the CFC did not conclude any fill for development "could *never* occur." Answ. Br. 20. These arguments are not a defense to a *Lucas* taking according to United States Supreme Court, Federal Circuit Court of Appeals and Federal Claims Court decisions. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 607-608 (2001); *see also Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1175 (Fed. Cir. 1994) (The question is not whether the takings claim "account[s] for a possibility that all permits would not be obtained"); *City National Bank of Miami v. U.S.*, 33 Fed. Cl. 244, 230 (1995); *Formanek v. United States,* 18 Cl. Ct. 785, 793 (1989);

Lost Tree Village Corp. v. U.S., 115 Fed. Cl. 219, 230-231 (2014) ("*Lost Tree III*") (Rejecting this proposition and finding prior attempts by the government to make this argument have been rebuffed by the Federal Circuit and Claims Court); *Florida Rock Industries*, *Inc. v. U.S.,* 791 F.2d 893, 904 (Fed. Cir. 1986). The landowner bears no such burden.

As *Loveladies* explained, the plaintiff bears the burden of proving the elements of their cause of action, including the absence of any remaining economically viable use. *See Loveladies Harbor, Inc. v. U.S.,* 21 Cl. Ct. 153, 157-158 (1990). After the plaintiff presents evidence of the absence of economically viable use, the burden of production shifts to the Government to prove economically viable use *does* remain. *See Id*. (emphasis added). In fact, in *Loveladies*, the Court pointed out that the Government failed to meet its burden entirely, "relying instead on its perception that plaintiffs bear the entire burden of proof and persuasion." *Id*.[1]

Here, it is undisputed Lemon Bay's residentially zoned property is over 99% wetlands, having no developable uplands. Appx1613. Thus, the Property remains

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[1]The Government cites *Loesch v. U.S.*, 227 Ct. Cl. 34 (1981), in support of its contention that it bore no burden of persuasion here. However, *Loesch* predates *Loveladies*, is not "binding precedent," is not a *Lucas* taking case, and is irrelevant. Answ. Br. 22. The Government also cites *Tahoe-Sierra* stating it conflicts with the principle of burden shifting. Again, such a contention is inaccurate as *Tahoe-Sierra* makes no mention of burdens of proof in a *Lucas* analysis. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002).

economically idle without a Corps permit. Moreover, just like the plaintiffs in *Loveladies*, Lemon Bay produced significant testimony and evidence that absent a Corps permit, the fair market value of the land resulted in a 99.7% diminution in value based on its residential highest and best use. Appx475-476. And the Government's review appraiser conceded Lemon Bay would have no economically beneficial use of the land without a Corps permit. Appx444-445, Appx947, Appx475-476. Just like in *Loveladies*, the Government here offered "little or no proof" of remaining economic uses. At least in *Loveladies*, the Government proposed some alternative economic uses, albeit without evidence of probability, adaptability or demand. *Id*. Here, the Government has not even attempted to meet its burden by proposing any alternative uses, let alone economically viable ones.

The Government insists *Lost Tree* is "much different" and not instructive. Answ. Br. 20. Yet, *Lost Tree* is the most recent Federal Circuit Court of Appeals case, cited by either party in this action, involving a Corps permit denial of a wetlands fill permit and is thus highly authoritative. *See Lost Tree Village Corp. v. U.S.*, 787 F.3d 1111 (Fed. Cir. 2015) ("*Lost Tree IV*").

The Government tries to distinguish *Lost Tree* since the Corps in that case admitted it gave particularly adverse treatment to the landowner. Answ. Br. 20. Here, the Government argues conversely, there was no proof the Corps would have denied Lemon Bay some smaller fill footprint. Answ. Br. 20. However, the Court

in *Lost Tree* does not credit its finding of a *Lucas* taking with the Corps' intentions to deprive the landowner a permit. It only analyzes the Corps' intentions in its *Penn Central* analysis to determine the character of the government taking. *Lost Tree III,* 115 Fed. Cl. at 232. The landowners in *Lost Tree,* like the landowners in *Loveladies*, were not required to prove the Corps would have denied a smaller fill footprint to satisfy a *Lucas* taking. As here, the landowner in *Lost Tree* was only required to show the taking resulted in total economic deprivation. It was then the burden of the Government in those cases, as here, to produce evidence of probable alternative economic uses for the land. Here, the Government completely failed to do so.

The Government cannot fulfill its burden by inferring an improbable, speculative future prospect of obtaining a permit for a smaller fill footprint. This is especially true since the Government offered no specifics and has failed to explain why its regulatory rationale for denying Lemon Bay's application would not be equally applicable to any subsequent application for a smaller fill footprint. If this were the standard, every deprived landowner would be required to resubmit permits *ad infinitum* in order to prove a negative. Such a requirement is unreasonable on its face once it becomes clear, as here, that no permit will be approved under the regulatory scheme applied. This conclusion is reinforced by the Corps' own section 404 regulations which were applied in this case. Those

regulations create a near conclusive presumption of less environmentally damaging practicable alternatives in the case of waterfront residential development. In Lemon Bay's case, since the property is almost entirely wetlands, these regulations *presume*, near conclusively, the taking of Lemon Bay's property by requiring Lemon Bay to acquire and seek to develop non-wetland sites while foregoing residential development of the residentially zoned waterfront property it already owns; property that carries with it statutorily vested bulkhead and fill rights.

The Corps own Memorandum of Record states the following:

> The Corps has determined (see attached approved JD) that approximately 96% of the 5.64 acre project site contains federally regulated waters of the United States (e.g., tidal flats, mangrove forests, sea grasses, etc.) with the remaining 4% of the site containing miniscule, isolated pockets of uplands areas, that are intermixed throughout the site and a manmade beach. Accordingly, it is reasonable to conclude that *no construction could occur on site without DA authorization and there are no on-site, no action alternatives that would meet the overall project purpose.*

Appx1613 (emphasis added). The Corps thereby acknowledges the only practicable alternative left for Lemon Bay would be to abandon its current property and invest $3.4 million into an alternative unrelated property.[2] If this solution is

[2]The Corps states that Lemon Bay's financial analysis for acquiring an alternative site "is biased towards the Applicant's specific financial situation and does not consider overall cost in an industry neutral perspective. The comparison of cost is only meaningful if the same metric is used for all alternatives. Thus, the Corps looks to current market value, which represents the opportunity cost for each alternative, rather than the Applicant's actual acquisition cost." Appx1611. This makes little sense. If land acquisition cost is not to be accounted for, then why is

not unduly burdensome on a landowner, then what is? What is more, the Corps admitted no construction could occur on this site, no matter the size of the fill.

Of particularly significance in this case is the threshold question of what property is to be valued, or, as the Supreme Court coined it, what is the "parcel as a whole." *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 130-131 (1978). "This issue is particularly important for wetland cases… because permit denials or conditions are frequently directed only to the wetland portions of properties that invariably contain uplands." *Walcek v. U.S.*, 49 Fed. Cl. 248 (2001) (citing Mark A. Chertok, *Federal Regulation of Wetlands*, SE98 ALI-ABA 715, 779 (2000)).

> Thus, to the extent the property captured in the denominator includes only wetlands, the impact of the regulation in diminishing the value of the corresponding numerator is predictably more pronounced, and thus more indicative of a taking, than would be the case if the same denominator were to include not only the wetlands, but also the uplands and other property unrestricted by the regulation.

Id. at 258-259.

All of the wetlands cases cited by the Government consist of a taking claim

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the Government permitted to account for Lemon Bay's acquisition cost in support of its denial, whereby the Government has alleged Lemon Bay held no investment backed expectation and suffered no economic impact due to the permit denial because of the purchase price. It is a double standard. Further, under the Corps' regulations, Lemon Bay would be required to acquire new property for $3.4 million and develop it while foregoing development of the property it already owns, regardless of the purchase price, thus incurring an additional $3.4 million in costs no matter how much was initially invested.

where only a portion of the property was wetland and thus, "the parcel as a whole" lacked total economic deprivation. *See Norman v. United States,* 429 F.3d 1081, 1092 (2005) (relevant parcel consists of 2280 acres of which 220.85 acres consisted of wetlands); *see also Forest Properties, Inc. v U.S.*, 39 Fed Cl. 56, 71 (1997) (landowner had 53 acres of usable land and only .04 acres of lake bottom wetlands); *Good v. United States,* 189 F.3d 1355 (Fed. Cir. 1999) (landowner owned 40 acre tract, 32 of which were wetlands); *Mehaffy v. U.S.*, 499 Fed. Appx. 18 (Fed. Cir. 2012) (landowner owned roughly 30 acres of uplands it could have developed but instead sought to fill the wetlands portion of its property).

Lemon Bay's entire parcel consists of wetlands. Appx100. There is no developable upland or adjoining developable parcel. In *Lost Tree IV*, the Court found a compensable taking of 4.99 acres of submerged lands (the "parcel as a whole") that lost 99.4% of its value due to the Corps denial of a 1.13-acre fill. *See Lost Tree,* 787 F.3d at 1116. Such is the case here.

Finally, the "highest and best use" of the property is the legal standard by which economically beneficial or productive use is measured when determining a *Lucas* taking. *See Lost Tree III*, 115 Fed. Cl. at 228. Here, the Property's highest and best use was valued at $3,800,000 and suffered a 99.7% diminution in value due to the Corps denial. Appx474-476, Appx444-445, Appx947.

B. The Circumstances Clearly Indicated The Corps Would Never Grant Lemon Bay A Permit

The Government's only *Lucas* defense is that Lemon Bay did not prove that the Corps would deny a smaller fill footprint. As stated above, the burden of proof in a *Lucas* taking case does not require the landowner to prove a negative. *See Palazzolo,* 533 U.S. at 607-608; *see also Loveladies*, 28 F.3d 1171 at 1175; *City National Bank of Miami*, 33 Fed. Cl. at 230; *Formanek,* 18 Cl. Ct. at 793; *Lost Tree III,* 115 Fed. Cl. at 230-231.

The Government contends the landowner in *Palazzolo* submitted evidence that additional "permit applications were not necessary" to establish that "on the wetlands there can be no fill for any ordinary land use." Answ. Br. 2. But the landowner has no such burden. The Court in *Palazzolo* found additional applications were unnecessary because of the "nature of wetlands regulation" and "there [was] no indication the Council would have accepted the application had the proposed club occupied a smaller surface area." *Palazzolo*, 533 U.S. at 607-608. It is the Government's burden to demonstrate how a smaller fill footprint would have been permitted. Otherwise, as in *Palazzolo*, the prohibitive regulatory impact on the wetlands would continue to be prohibitive regardless of the fill size. And the Corps report did specifically state, in light of the entire property topography, "there are no on-site, no action alternatives that would meet the overall project purpose." Appx1613. There is no further evidence required and additional permit

applications were not necessary to establish this point.

The Government also attempts to distinguish this case from *Fla. Rock. Indus., Inc. v. U.S.*, 791 F.2d 893 (Fed. Cir. 1986), where continued denial of a permit application was "inevitable". Answ. Br. 23. The Government contends, without explanation, that Lemon Bay "cannot show" the same here because application for a "small fill footprint or water dependent use *might* be granted." Answ. Br. 23. Throughout the permit process, administrative appeal process and this case, the Government has given *no* indication of what, if any, smaller fill footprint "might" be approved.[3] This case is quite like *Fla. Rock*. What makes the denial "inevitable" in *Fla. Rock*, as here, was not the size of the fill, but the nature of the land the parties were seeking to fill. *See Id*. at 904. The landowner in *Fla. Rock* was not required to prove denial was inevitable. *See Id*. The Court independently found inevitability as:

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[3]The Government also posits that Lemon Bay could have sought a permit for "less-intense, non-water dependent uses." Answ. Br. 25. However, when a landowner proposes to fill wetlands for a non-water dependent use, the Corps guidelines require it to presume that less environmentally damaging practicable alternatives are available. 40 C.F.R. §230.10(a)(3); 40 C.F.R. §230.3(q-1) and 40 C.F.R. §230.41. The Government has offered no suggestion of how Lemon Bay would have overcome the Corps presumption of denial of a non-water dependent use; or suggested a non-water dependent alternative. Dr. Fishkind testified the Corps, in his experience, would not have permitted the project for a water-dependent use. Appx454. And, regardless of the water dependency issue, there were no developable portions of the 5.64 acres of wetland according to the Corps. Appx1613.

> [I]t is and, for the immediate future, remains illegal to mine without a permit in the only fashion Florida Rock considers feasible. Florida Rock could apply seriatim for permits to allow mining on the rest, and inevitably, from the evidence and the findings, have them denied. We do not think that the mere possibility a permit might be granted, like the possibility one might put a pot of water on a hot stove and have it freeze, is a reality requiring us to deem that … Florida Rock might in theory mine a lot of limestone, or perhaps market a housing development as appellant also would have us speculate.

Id. Here, all the evidence and findings show Lemon Bay's land consists of 5.64 acres of wetlands. Appx1613. All of the land will remain now and for the immediate future, according to the Corps, an "Aquatic Resources of National Importance," the filling of which would cause damage to what the Corps classifies as "Essential Fish Habitats." Appx1596. In conclusory fashion, the Corps determined removal of the mangroves and filling of the land will impact a diversity of native species, have varying effects on water movement, add pollution into the ecosystem, and effect recreational and commercial fisheries. Appx 1615-1621. Nowhere in the Corps Memorandum of Record denying Lemon Bay's permit, do they suggest that any of these effects would be any different if Lemon Bay removed fewer mangroves and filled a smaller amount of land. Like in *Fla. Rock*, the nature of the land is such that a denial of any permit would be inevitable. Lemon Bay need not disprove the "mere possibility" of a permit approval as the Government would have this Court conclude.

Lemon Bay's conduct is nothing like the "obdurate behavior" cited in

Mehaffy v. U.S., 102 Fed. Cl. 755, 768 (2012), as the Government suggests. Answ. Br. 28. In *Mehaffy*, the landowner had 30 acres of upland they could have developed. They instead attempted to develop the wetland portion. *Id*. They did not explain why the wetlands needed to be filled, consider development alternatives to avoid the wetlands, consider using any land as a mitigation bank, or commission a survey to demonstrate the effects of their actions. *Id*. Here, the evidence demonstrates: (i) the Property consists of 5.64 acres, 97.4% of which are wetlands which already carried with them statutory bulkhead and fill rights; (ii) Lemon Bay avoided filling 2.08 acres or 63% of the Property; (iii) Lemon Bay proposed to preserve and dedicate to the public the remaining unfilled 3.56 acres consisting of the most ecologically valuable submerged lands and mature mangroves lying below the mean high water line; (iv) Lemon Bay proposed a single, less impactful, multi-slip boat dock in the deeper waters along its water frontage rather than 9 individual docks spread out along the shallower more ecologically sensitive portions of its water frontage; (v) to protect manatees, Lemon Bay agreed to comply with Charlotte County regulations limiting the number of boat slips to 9 and the US Fish and Wildlife Service's Manatee Key regulating dock construction; (vi) Lemon Bay designed the dock to comply with State aquatic preserve and sovereign lands lease regulations; and (vii) Lemon Bay reserved mangrove mitigation credits in the Corps approved Pine Island Mitigation Bank. Appx267-

270. Accordingly, reliance upon *Mehaffey* is clearly misplaced.

The Government cannot defend this taking with lip service to speculative future outcomes. Accordingly, the CFC erred in denying Lemon Bay's *Lucas* claim.

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

As explained in Lemon Bay's initial brief, the Government failed to prove the availability of TDUs contributed to the value of the Property. Mr. Gilbert and Dr. Fishkind offered unrebutted testimony that they did not. Appx543, Appx2681-2685. Mr. Carlson confirmed this and Mr. Dodds, whose opinions the CFC found unpersuasive, did not opine the TDUs contributed value to the property. Appx2295. The Government has not pointed out evidence supporting its implication that TDU's added value specifically to Lemon Bay's property.

The Government argues Justice Scalia in *Suitum v. Tahoe Reg'l Plan. Agency,* 520 U.S. 725, 749 (1997) did not abrogate the holding in *Penn Central* regarding TDU's. Yet, *Suitum* specifically distinguished *Penn Central* stating:

> [Penn Central] can be distinguished from the case before us on the ground that it was applied to landowners who owned at least eight nearby parcels, some immediately adjacent to the terminal, that could be benefited by the TDRs...The relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished. It is for that reason that the TDRs affected "the impact of the regulation."... *If Penn Central's one-paragraph expedition into the realm of TDRs were not distinguishable in this fashion, it would deserve to be overruled*. Considering in the takings

> calculus the market value of TDRs is contrary to the import of a whole series of cases, before and since, which make clear that the relevant issue is the extent to which use or development of the land has been restricted. Indeed, it is contrary to the whole principle that land-use regulation, if severe enough, can constitute a taking which must be fully compensated.

Suitum, 520 U.S. at 749.

Moreover, *Penn Central* did not address whether TDUs are to be considered in determining whether a regulation deprives a landowner of all economically beneficial use under *Lucas*. Rather, *Penn Central*'s reference to TDUs related to whether they mitigate the economic impact of the regulation under its multi-factor test. *See Penn Central,* 438 U.S.at 137. They do not, for the reasons articulated by Justice Scalia in *Suitum*:

> TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory degree) "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.

520 U.S. 725, 747 (1997) (emphasis in original).

The Government's reliance upon *Good v. United States*, 39 Fed Cl. 81 (1997) is unavailing. Answ. Br. 30. There, the plaintiff owned not just the wetlands at issue, but also substantial upland tracts that could accept TDRs. *See Id.* at 1357. The same is true for *Penn Central*, where the Court recognized available TDRs were relevant to the takings analysis *only because* the plaintiff owned nonadjacent

properties where TDRs could be used to increase their value and mitigate loss. *See Penn Central,* 438 U.S. at 137.[4] Here, there is no evidence the availability of TDUs enhanced the value of the property. The facts of *Good* and *Penn Central* are further distinguishable from this case as Lemon Bay has no uplands or other property to which it may transfer density, and accordingly, applying the speculative contingent value of TDUs is improper.

II. LEMON BAY SUFFERED A REGULATORY TAKING UNDER *PENN CENTRAL*

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

While it is indeed true that knowledge of a preexisting regulation may factor into a party's reasonable investment backed expectation, it is not the *only* factor. However, it *is* the only factor the CFC considered and the Government argues in concluding Lemon Bay lacked reasonable investment backed expectation. Sole reliance upon this single consideration is clearly erroneous.

Palazzolo, 533 U.S. 606 is binding precedent in this Court. It is the most recent Supreme Court case which addressed the issue of how preexisting regulatory regimes factor into the context of investment backed expectations under

[4]*See Loveladies Harbor, Inc. v. U.S.*, 15 Cl. Ct. 381, 393 n. 10 (1988) (finding transferable development air rights could ***mitigate*** loss by giving additional development opportunities to plaintiff's other nearby properties and accordingly factoring those properties into consideration because the enhancement of ***their value*** offset the loss of value to the disputed property.).

Penn Central. Yet, the CFC ignored *Palazzolo* in its decision, instead choosing to rely on a Federal Claims Court Case, *Mehaffy*, 102 Fed. Cl. at 765, with clearly inapposite facts.

Under *Palazzolo*, the pre-existing regulatory scheme is supposed to be but "one factor" to consider in assessing a regulation's impact on investment-backed expectations. *See Palazzolo*, 533 U.S. at 634.

> Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner… If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title.

Id. at 634-635. None of the cases cited in the CFC's order or the Government's answer weigh factors beyond the preexisting regulatory regime. In addition, most of the cases cited in the Government's response precede *Palazzolo*.

Lost Tree is one of few cases subsequent to *Palazzolo* where the Court discusses a landowner's various other investment backed expectations in light of a preexisting regulatory regime. *Lost Tree III,* 115 Fed. Cl. at 232. In that case, the Court determined Lost Tree developed an investment-backed expectation for the relevant plat. *See Id*. The Court found those expectations were "not unreasonable"

given the landowner had projected development at another nearby development, was going to obtain development credits and had obtained other local permits and approvals. *See Id*. The Court ultimately found this factor "[did] not weigh in either party's favor." *Id*.

Lemon Bay developed legitimate investment backed expectations for its property, none of which were factored by the CFC. Lemon Bay's expectations are more reasonable and distinct than those factored by the Court in *Lost Tree III*. The following illustrates 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 larger, 12-acre portion of the property's parent tract that also carried with it vested bulkhead and fill rights;

(3) The property is in a prime location with 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. Under Florida law, the local comprehensive land use plan is likened to a constitution for all future development. *See Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d. DCA 1987).

(5) 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;

(6) 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;

(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;

(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 remainder; and

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

Importantly, the CFC's expectations holding contradicts its holding rejecting Lemon Bay's *Lucas* claim. Appx22-23. If Lemon Bay should have reapplied for a Corps permit, assuming the Corps might have approved the application, thereby negating a *Lucas* taking, then why shouldn't Lemon Bay have had a reasonable expectation of obtaining a permit?

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

The Government states the CFC correctly found the economic burden on Lemon Bay was of their own doing, as it "stemmed" from Lemon Bays desire to offset its investment. Answ. Br. 44. The "burden" of Lemon Bay's business deal is irrelevant and brought up solely to distract the Court with the narrative that Lemon Bay is a greedy developer. Answ. Br. 44. To measure the character of the Government action, no Court looks to the amount or character of the initial financial investment in the land. Whether Lemon Bay inherited the land for free or purchased it for $2 million, they are rightful owners of a property that they have invested in and now have to carry without the possibility of development.

In considering the character of the government action the court must consider "the nexus between the regulation and its effects looking at the 'relative benefits and burdens associated with the regulatory activity'." *Resource Investment, Inc. v. U.S.,* 85 Fed. Cl. 447, 517 (2009) (quoting *Bass Enterp. Prod. Co. v. U.S.*, 381 F.3d 1360 (2004)). The Court is to consider whether the burden

benefiting the public was "placed disproportionately on a few private property owners" and if the character of the government action is "merely bestowing upon the public a nonessential benefit." *See Cienega Gardens*, 331 F.3d at 1338; *see also Resource Investments,* 85 Fed. Cl. at 517 (citing *Fla. Rock*, 18 F.3d 1560, 1571 (Fed. Cir. 1994)). The Government's answer offers no analysis of the effect of the regulation on Lemon Bay or the proportionality of the burden.[5]

The Government does not acknowledge or contest its own findings showing that the proposed filling would only affect .018% of the mangrove shoreline of Charlotte Harbor and would only reduce the estimated $11 billion value of Florida fisheries by .000133%. Appx643-644, Appx966-967, Appx969-970. While, in turn, the permit denial burdens Lemon Bay by leaving the property economically idle with the responsibility of paying taxes while reducing its value by 97.4%. There is no question here that the burden of the permit denial was solely and disproportionately placed upon Lemon Bay, forcing it to forego any feasible development of its property. The CFC and the Government failed to consider these undisputed facts.

C. The Economic Impact Was Severe Enough to Constitute a Regulatory Taking

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[5]The Government here contends the burden on the landowner must be unforeseeable in order to establish a government taking under this prong. Answ. Br. 42. However, no case citied by the Government considers foreseeability of a preexisting regulation as a factor in the rational nexus test called for here.

1. Lemon Bay did establish the value of its property

The Government argues Lemon Bay failed to establish the value of the property with the Corps permit because Lemon Bay's figure "assumes" it could have built a residential development. How else would Lemon Bay establish the value of developed land if not by assuming the land was developable? It is axiomatic that a government may not lower the fair market value of a property by relying on the possibility of the taking at issue. *Lost Tree,* 115 Fed. Cl. at 230-233. And a land valuation need not account for a possibility that other permits would be obtained, particularly where evidence shows those permits *could have* been obtained. See *Loveladies,* 21 Cl. Ct. at 156. The Government attempts to distinguish *Loveladies*. But the Court in *Loveladies* stated:

> Although defendant does not offer an alternative highest and best use, nor does it present its own appraisal of the property's fair market value before the permit denial, it seeks to discredit plaintiffs' argument, primarily by asserting that plaintiffs had not met the conditions imposed by the NJDEP, among which were mitigation and the very permit approval by the Army Corps of Engineers that is at issue in this case. Defendant claims that plaintiffs' appraisal is inadequate because it does not account for a possibility that all permits would not be obtained, a factor by which a knowledgeable buyer would discount his purchase price. Moreover, because the necessary state permits were not in place, the Corps' action could not have effected a taking. Plaintiffs' extensive evidence indicated that they would have been able to meet all of the state conditions had the Corps approved their permit request… Although it may be true that the plaintiffs' appraisal did not consider the possibility that all necessary permits would not be obtained, the evidence at trial indicated that the likelihood of that happening was negligible, and would have had no impact on the fair market value.

Id. at 156 & 156 n. 5.[6]

Similar to *Loveladies*, the Government here did not offer an alternative highest and best use, nor did it present its own appraisal of the property's fair market value before the permit denial. Even if the true value of the property departs from the valuation offered by Lemon Bay's experts, it is an error to hold that no value whatsoever was established.

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). In assessing fair market value of a property the court looks to its highest and best use. *Lost Tree III,* 115 Fed. Cl. at 228.[7] 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 Lemon Bay has not established an economic impact, the

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[6]The Government again seeks to distinguish *Lost Tree* without success. Answ. Br. 50. The fact that the landowner had obtained all other necessary permits in *Lost Tree* is dicta. *Lost Tree III,* 115 Fed. Cl. at 230-233. The Court states "it is especially true in this case" that the plat being valued should be measured at its "highest and best use" because it had obtained other necessary permits. *See Id.*

[7] The valuation is not limited to "the use to which the property [was] devoted" at the time of the taking, but also "that use to which it may be readily converted." *United States v. Powelson*, 319 U.S. 266, 275 (1943).

CFC and Government conclude the denial of the Corps permit had no impact on the fair market value of the property. Or, essentially, that the land is valueless with or without a permit. Such a conclusion is neither supported by evidence nor logic.

The Government seeks to distinguish *Ciampetti v. U.S.*, 18 Cl. Ct. 548 (Fed. Cl. 1989) because the court there finds the U.S. could not use state permit denials as a defense to liability. Whereas here, the alleged inability to obtain state permits could be a defense to specifically establishing an economic impact. This is an argument based on semantics. The establishment of severe economic impact *is* an element used to establish liability. In *Ciampetti*, the Court's analysis confirms the importance of viewing the federal government action independent from the state regulatory actions. *Id.* at 555. The Court expressly states:

> 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.

The Government continues to suggest Lemon Bay is not entitled to a $3.8 million valuation, or apparently any valuation of note, because it purchased the property for little money after a foreclosure sale. Answ. Br. 47. However, this Court has already noted the importance in considering the severity of the economic impact by factoring in "the owner's opportunity to recoup its investment *or better*, subject to the regulation." *See Fla. Rock,* 18 F.3d at 1567 (citing *Fla. Rock*, 791

F.2d at 905) (emphasis supplied). Regardless, Lemon Bay need not justify the purchase price in order to establish value, especially given the highly valuable waterfront character of its property. And it bears noting, Lemon Bay received an assignment of rights from its related entity, I.H.T Corporation, including the ability to recoup I.H.T's $891,078.02 in losses as a foreclosing mortgagee. Here, the Government has failed to substantively contest or offer an alternative valuation and the CFC erred in concluding no financial loss was established.

2. The CFC incorrectly concluded Lemon Bay was unlikely to receive all necessary permits

As stated above, the likelihood of receiving State or County permits is not the appropriate test by which a Court determines economic loss as a result of a Federal regulatory denial. *See Ciampetti,* 18 Cl. Ct. 548; *see also Lost Tree,* 115 Fed. Cl. at 230-233; *Loveladies,* 21 Cl. Ct. at 156.

Nevertheless, Charlotte County preliminarily approved a larger fill footprint having greater residential density and would have likely approved a smaller, less dense footprint. Appx352, Appx360-365, Appx369. Notably, Lemon Bay also received a fill permit from the State of Florida for a virtually identical footprint. And Dr. Depew offered sound testimony that Lemon Bay would receive approval for a nearly identical fill footprint. He developed a 7-unit site plan based on the previously state-approved fill footprint. In his plan he assumed construction techniques to minimize the amount of fill 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. The Government states Dr. Depew did not acknowledge the County's Comprehensive Plan wetland preservation policy. Answ. Br. 55. But Dr. DePew noted the Property was rezoned from RM-10 to MMF 7.5 in 2011 indicating the County did not intend to prohibit development. Appx389. He opined, if the County was concerned with strict wetland preservation, it would have designated the Property to a preservation or environmentally sensitive zoning category. Appx389. Dr. Depew also based his opinion on statutory laws governing comprehensive plan consistency determinations, the prior state-approved fill permit and mitigation plan, the County's Comprehensive Plan which does not prohibit filling of wetlands, the MDR future land use map and zoning designations, and prior County subdivision and site plan approvals. Appx363-365. There was nothing "breezy" about his conclusions and the CFC erred by not crediting his testimony.

In interpreting comprehensive plans and land development regulations under Florida law, the Florida Legislature states:

> It is the intent of the Legislature that all rules, ordinances, regulations, comprehensive plans and amendments thereto, and programs adopted under the authority of this act must be developed, promulgated, implemented, and applied with sensitivity for private property rights and not be unduly restrictive, and property owners must be free from actions by others which would harm their property or which would constitute an inordinate burden on property rights as those terms are defined in s. 70.001(3)(e) and (f). Full and just compensation or other

> appropriate relief must be provided to any property owner for a governmental action that is determined to be an invalid exercise of the police power which constitutes a taking, as provided by law.[8]

See §163.3161(10), Fla, Stat. (2017). The CFC's opinion and Government's argument to preclude Lemon Bay's proposed development cannot be squared with this requirement that governed the County's approval of fill of Lemon Bay's property.

Mr. Dinkler, Lemon Bay's expert in wetland ecology and local, state, and federal wetland and submerged land permitting, testified the SWFWMD and the State of Florida would grant sovereign lands authorization for the boat dock. Appx277, Appx300-301. His testimony was unrebutted. Moreover, the governing State regulations prohibit denial of such authorization if, as here, it would unreasonably infringe upon the traditional, common law and statutory riparian rights of upland riparian property owners. Fla. Admin. Code § 18-20.004(4)(a). The CFC's failure to consider or weigh Lemon Bay's expert testimony was in error.

III. THE CORPS PERMIT DENIAL WAS A TAKING OF LEMON BAY'S RIGHT TO BULKHEAD AND FILL

It is undisputed the State of Florida conveyed the Property to Lemon Bay's

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[8]Section 70.001(1), Florida Statutes, gave landowners a statutory damage claim where government regulation "inordinately burdens" real property "without amounting to a taking under the State Constitution or the United States Constitution."

predecessor in 1954 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." *See Trustees of Internal Improvement Trust Fund v. Claughton*, 86 So. 2d 775, 789 (Fla. 1956); *see also Zabel v. Pinellas County Water & Navigation Authority*, 171 So. 2d 376, 380-81 (Fla. 1965) (Florida Supreme Court holds these rights run with title to the lands sold, are the only present rights attributable to ownership of submerged land and constitute property protected by the constitution); *Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374, 1381, 1384 (Fed. Cir. 2000) (this Court found a *Lucas* taking where "the property owner under state law had the right to dredge and fill [the submerged lands]").[9]

The Government erroneously implies that repeal of section 253.15 by the

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[9]These bulkhead and fill rights are clearly distinguishable from the air rights involved in *Penn Central* since the former involve the right to create useable land in the first instance.

Bulkhead Act in 1957 divested the owner of these rights. However, the Government ignores Section 253.12(2), Florida Statutes (1957), which both preexisted and survived enactment of the Bulkhead Act, providing:

> (2) *All* conveyances of sovereignty lands *heretofore made* by the trustees of the internal improvement trust fund of Florida subsequent to the enactment of chapter 6451, acts of 1913, and chapter 7304, acts of 1917, *are hereby ratified, confirmed, and validated in all respects.*

(emphasis added).

This argument also ignores the very section of the Bulkhead Act cited by the Government which states:

> Sections 253.06 through 253.11, 253.13, 253.15, Florida Statutes, are repealed and all laws and parts of laws in conflict herewith be and the same are hereby repealed *but this act shall not be construed to be in conflict with any general or special law whereby the state of Florida has divested itself of title to submerged land or has granted such title to another.*

Ch. 57-362, § 10, Laws of Fla. (emphasis added).

The Government's argument that such rights cannot be taken is clearly erroneous.

CONCLUSION

For the foregoing reasons, the CFC, 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 CFC, hold that the Government affected a compensable regulatory taking of Lemon Bay's

property and bulkhead and fill rights, and remand for further proceedings as appropriate.

Respectfully submitted,

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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 6999 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 May 9, 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