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.

Appeal from the United States Court of Federal Claims
No. 17-436L (Hon. Mary Ellen Coster Williams)

APPELLEES' ANSWERING BRIEF

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GLOSSARY

CFC	Court of Federal Claims
Corps	U.S. Army Corps of Engineers
EPA	U.S. Environmental Protection Agency
Fisheries Service	National Marine Fisheries Service
IHT	I.H.T. Corporation
Lemon Bay	Lemon Bay Cove, LLC

STATEMENT OF RELATED CASES

No appeals from the same civil action were previously before this Court or any other appellate court. Undersigned counsel is unaware of any pending related cases within the meaning of Federal Circuit Rule 47.5.

INTRODUCTION

Plaintiff Lemon Bay Cove, LLC, ("Lemon Bay") owns a 5.64-acre waterfront parcel on Lemon Bay near Englewood, Florida. The property consists of submerged lands, mangrove wetlands, and small upland areas. Lemon Bay claims that the United States took that property when the U.S. Army Corps of Engineers denied the company's application for a Clean Water Act permit to fill in 2.08 acres of the mangrove wetlands for a residential development.

Before Lemon Bay owned it, Gerald LeFave acquired the property in a 1993 tax sale for $12,300. While LeFave owned the property, I.H.T. Corporation ("IHT") loaned LeFave $750,000 to fund a plan for a 39-unit condominium development on the property. When that plan failed, IHT purchased the property at a foreclosure sale for $15,200. In an attempt to recoup its investment, IHT formed Lemon Bay Cove, LLC, and transferred the property to Lemon Bay for $10. Despite Lemon Bay's own consultant warning it that obtaining development permits would not be easy, Lemon Bay then attempted to secure necessary permits for a new, twelve-unit residential development project.

But throughout the permitting process, Lemon Bay refused the Corps' repeated requests—all consistent with the requirements of the Clean Water Act Section 404(b)(1) Guidelines—to avoid or minimize impacts to wetlands. Instead, Lemon Bay insisted on pursuing its proposed twelve-unit residential development,

which would require the destruction of 2.08 acres of wetlands, on the view that any smaller development would not recoup the losses from IHT's loan to Mr. LeFave. And from the outset, Lemon Bay coupled its permit application to the Corps with correspondence threatening takings litigation if the Corps did not grant approval.

When the Corps denied Lemon Bay's permit application, consistent with its decades-old regulatory regime and in the face of Lemon Bay's refusal to consider alternatives to its twelve-unit residential development, Lemon Bay filed this takings claim and asserted to the Court of Federal Claims that it could have earned $3.8 million in profits by constructing yet another project—a seven-unit, residential development—that was never submitted to the County, the State, or the Corps. The CFC concluded that the Corps' denial of a permit for Lemon' Bay's proposed twelve-unit development did not deprive Lemon Bay of all economic use of the property and thus did not constitute a categorical taking. The CFC further held that Lemon Bay had failed to demonstrate a taking under the three-factored *Penn Central* test given Lemon Bay's failure to show that it had any reasonable investment-backed expectation of an ability to substantially develop the property, that the nature of the regulatory restricts imposed an unfair burden on Lemon Bay, or that the Corps' permit denial caused Lemon Bay any significant economic impact in light of reasonable investment-backed expectations. This Court should affirm.

STATEMENT OF JURISDICTION

(a) The Court of Federal Claims had subject matter jurisdiction under 28 U.S.C. § 1491(a)(1) because Plaintiffs' claims arose under the Fifth Amendment of the United States Constitution and sought just compensation as monetary damages. Appx49.

(b) The CFC's judgment was final because it disposed of all claims against all defendants. Appx1. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

(c) The judgment was entered on July 15, 2022. Appx28. Lemon Bay filed its notice of appeal on September 13, 2022, or 58 days later. Appx3102. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the CFC correctly concluded that Lemon Bay had not produced sufficient evidence to show that the Corps' denial of Lemon Bay's application for a permit to fill 2.08 acres of mangrove wetlands to build a twelve-unit residential development with a nine-slip dock in an aquatic preserve deprived Lemon Bay's property of all economic value and therefore constituted a categorical taking under *Lucas*.

2. Whether the CFC correctly concluded that Lemon Bay had not produced sufficient evidence to show that the Corps' denial of Lemon Bay's

application for a permit to fill 2.08 acres of mangrove wetlands to build a twelve-unit residential development with a nine-slip dock in an aquatic preserve constituted a regulatory taking under *Penn Central*.

3. Whether the CFC correctly concluded that Lemon Bay cannot assert a separate taking of its alleged statutory right to bulkhead and fill its property that is segregated from the property as a whole.

STATEMENT OF THE CASE

A. Statutory and regulatory background

Congress passed the Clean Water Act 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 prohibits the discharge of dredged or fill material into waters of the United States—including jurisdictional wetlands—unless a permit, issued by the Army Corps of Engineers under Section 404 of the CWA, authorizes the discharge. 33 U.S.C. §§ 1311(a), 1344(a). The Clean Water Act thus delegates responsibility to the Corps to "protect wetlands subject to the Corps' jurisdiction from unnecessary destruction." *Deltona Corp. v. United States*, 657 F.2d 1184, 1188 (Ct. Cl. 1981).

The Corps' permitting decisions are governed by the Section 404(b)(1) guidelines in 40 C.F.R. § 230.10. Under the Section 404(b)(1) Guidelines, 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. *Id.* To make that demonstration, an applicant must evaluate both off-site alternatives and different on-site configurations.

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. 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).

B. Factual background

Lemon Bay's property at issue consists of 5.64 acres of submerged lands, high quality, functioning forested mangrove wetlands, and small upland regions on Sandpiper Key in Charlotte County, Florida. Appx2, Appx141, Appx672. The property includes tidal flats and open water and serves as a habitat for various birds and fish, some of which are threatened or endangered, as well as several threatened

and endangered reptiles and mammals, such as the West Indian manatee and sea turtles. Appx2, Appx141-142. The water body that abuts the property (named Lemon Bay) is classified as an Aquatic Preserve and an Outstanding Florida Water. Appx2, Appx141.

The property was originally held as sovereign land by the State of Florida, which in 1954 sold the property as part of a much larger tract of land to a private landowner. Appx2, Appx142. Over the years the parent tract was sold several times and some of it filled in before passage of the Clean Water Act, but not the portion now comprising Lemon Bay's property. Appx3. In the 1980s, Sandpiper Key constructed a condominium development on the northwest portion of the parcels that had been previously filled. Appx3. But Sandpiper Key left undeveloped the southern wetland areas containing what is now Lemon Bay's property and stopped paying taxes on that portion of the property. Appx3, Appx144.

In August of 1993, Charlotte County sold that undeveloped land at a tax sale to Mr. Gerald LeFave for $12,100. Appx3, Appx144. In 2007, Mr. LeFave sought to develop the property and proposed a development with thirty-nine condominium units and a boat ramp that would have required removing almost all mangroves on the property, constructing a bulkhead, and filling the wetlands. Appx3. To build that development, Mr. LeFave needed authorizations from three regulatory bodies:

Charlotte County, the Southwest Florida Water Management District ("Water Management District"), and the Corps. Appx3, Appx144. In 2008, Mr. LeFave met with a local businessman, Mr. Dominik Goertz, to seek investment capital for the former's planned condominium development. Appx3, Appx145. After reviewing Mr. LeFave's development plan and receiving appraisals of the property, Mr. Goertz advised IHT, a Florida real estate company, to invest. Appx3, Appx145. IHT loaned $750,000 to Mr. LeFave, secured by a mortgage on the property. Appx3, Appx145. At the time of the loan, DMK informed Mr. LeFave that there would be challenges in obtaining permits to develop the property and that there were "red flags that Mr. Lefave has to work on." Appx3.

Ultimately, Mr. LeFave defaulted on the loan and, in June 2010, a Florida state court granted summary judgment to IHT on its foreclosure petition. Appx4, Appx145-146. The court found that the total amount due on the LeFave-IHT note was $875,878.02 and held that if the total sum with interest and all costs of IHT's foreclosure action were not immediately paid, the Clerk of Court should sell the property at a public sale in accordance with Florida law. Appx4, Appx146. Two entities bid on the property at the public sale: IHT and another prospective purchaser. IHT made the highest bid and purchased the property for $15,200. Appx4, Appx146. At the time, IHT knew that the Clean Water Act and the

404(b)(1) regulations applied to the property and that "it would not be easy to obtain permits." Appx22-23, Appx 181.

After the foreclosure sale, IHT did not attempt to sell the property as-is because it determined that such a sale could not recoup IHT's $875,000 foreclosure judgment. Appx4, Appx194. IHT created Lemon Bay Cove, LLC, and transferred the property to that company in November of 2011 for $10. Appx5.

Before applying for any required permits, Lemon Bay produced a development plan that included a twelve-unit townhome development with a docking facility on the property's southern edge. Appx7. The dock would be built in state sovereign lands (lands Lemon Bay does not own) that are part of the Lemon Bay Aquatic Preserve. Appx7, Appx148, Appx150, Appx153. In a pre-application meeting between Lemon Bay and the Southwest Florida Water Management District, the Water Management District advised Lemon Bay not to include any docking facilities in state sovereign lands in the permit application for its planned residential development because these docks could push the development into the heightened public concern category, thus requiring approval from the Board of Trustees of the Internal Improvement Trust Fund, which includes the Governor of Florida and his or her cabinet. Appx7, Appx150.

In February and April 2012, Lemon Bay applied to the Water Management District and the Corps for required permits. Lemon Bay did not propose docks in

its permit applications. Appx7, Appx152-153. Lemon Bay received an Environmental Resource Permit from the Southwest Florida Water Management District (effective through January 5, 2018), which approved a twelve-unit project without a docking facility, conditioned, among other things, on Lemon Bay obtaining approvals from the Corps and Charlotte County, as well as protecting manatees and sea turtles from direct project effects. Appx7, Appx152-153, Appx1492, Appx1497.

Lemon Bay told the Corps in December 2012 that if the Corps did not grant Lemon Bay's permit application it "would result in a takings by the U.S. Army Corps of Engineers and would be a substantial cost to the U.S. Army Corps of Engineers." Appx572, Appx3157. Lemon Bay further represented that the proposed twelve-unit development reflected the smallest impact possible to recoup the losses incurred because of Mr. LeFave's default. Appx9, Appx200.

The Corps issued a public notice regarding the project and received hundreds of letters in opposition. Appx7, Appx154. The federal Environmental Protection Agency and National Marine Fisheries Service ("Fisheries Service") expressed concerns about the project's impact on mangrove wetlands, marine habitats, and local fish and wildlife. Appx8, Appx154. The EPA designated the mangrove wetlands on the property to be Aquatic Resources of National Importance and stated that the Lemon Bay project did not comply with the

guidelines established under section 404(b)(1) of the Clean Water Act. Appx8, Appx154.

The Corps determined that Lemon Bay's project was not water dependent because the project's basic purpose was to construct houses and therefore did not require access to a special aquatic site. The Corps informed Lemon Bay that, because the project was not water dependent, the Corps had to assume that less environmentally damaging practicable alternatives existed for Lemon Bay's development. Appx8, Appx155, Appx3134. In response to the Corps' concern that the project was not the least environmentally damaging practicable alternative, Lemon Bay submitted a document titled "Practical Alternatives Narrative" in December 2012. Appx8, Appx3154. That document analyzed three proposed alternative sites for the project in the Charlotte County area. Of the three sites identified in the narrative, two were not for sale, and the third would have cost $1.25 million to purchase. Appx3157. In the narrative, Lemon Bay represented that, as the property was acquired through foreclosure, development of this specific land was the only way for the former lender—and now current owner—to avoid incurring a total loss on its "investment" (that is, its failed loan to Mr. LeFave). Appx9, Appx155.

Lemon Bay later amended the project application to the Corps to include a thirteen-slip dock and asserted that the project was consequently water dependent.

Appx10, Appx155. The thirteen-slip dock that Lemon Bay included in its amended development proposal would be constructed outside the legal description of the lands the Trustees sold to Mr. Farr in 1954. Appx7. Thus, to construct the proposed dock on sovereign lands, Lemon Bay would have to acquire permission (for example, through a lease) to encroach on state sovereign lands. Appx7.

The Corps informed Lemon Bay that the project amendment raised concerns about conflicts with the Endangered Species Act and the Marine Mammal Protection Act because of the project's potential impacts to the West Indian manatee. Appx10-11, Appx156. Lemon Bay responded to the concerns raised with the proposed dock by reducing the slips on the proposed dock from thirteen to nine. Appx11, Appx156. But like the thirteen-slip dock, the modified nine-slip dock was proposed in state sovereign lands, outside the legal bounds of Lemon Bay's property and within the Lemon Bay Aquatic Preserve and would have required a lease from the State of Florida to encroach on sovereign lands. Appx156.

Following an inspection of the property and the adjacent waters, the Fisheries Service determined that the area where Lemon Bay proposed its dock supports seagrass habitat, which is designated as Essential Fish Habitat. As proposed, the project would adversely affect the seagrass Essential Fish Habitat because of the dock. Appx11, Appx675, Appx3187. As a part of the Corps'

interagency consultation for section 404 permit applications, the United States Fish and Wildlife Service issued a Biological Opinion evaluating Lemon Bay's proposed twelve-unit residential development with a dock for compliance with the Endangered Species Act. The Biological Opinion stated that the property had no upland shoreline that would allow for the construction of docks, and that creation of shoreline to allow for dock construction is inconsistent with manatee protection efforts. Appx156. The Biological Opinion stated that if Lemon Bay removed the dock from the proposed development, there would be no concerns related to the West Indian manatee. Lemon Bay declined to remove the dock from the proposed development. Appx3193, Appx3240.

In January 2014, the Corps reiterated its concern that Lemon Bay had not provided enough information to demonstrate that the proposed project was the least environmentally damaging practicable alternative as required by the Clean Water Act. Appx11-12, Appx156. Among other issues, the Corp requested that Lemon Bay demonstrate why a smaller development or off-site alternative was not practicable. Appx11-12. Lemon Bay responded to the concerns by repeating its statement that developing the property as proposed was the only way for Lemon Bay's investors to minimize its financial damage associated with the prior owner's default. Appx12, Appx3218. Lemon Bay also insisted that the twelve-unit single-

family development was the minimum necessary for an economically viable project. Appx12, Appx157.

The Corps again explained its concerns (1) that Lemon Bay had not shown the revised project to be the least environmentally damaging practicable alternative, (2) that Lemon Bay failed to provide an adequate alternative analysis, and (3) that the dock component of the project was likely to result in a "take" of the West Indian manatee. Appx12-13. The Corps noted that it would be unlikely to permit the project as proposed and invited Lemon Bay to address ongoing issues. Appx12, Appx157. In response, Lemon Bay voiced its disagreement with the Fish and Wildlife Service's conclusions about the dock and submitted a report from Market America Realty that Lemon Bay previously submitted to the Water Management District. Appx13. Attached to the Market America report was an "investment exit plan calculation," which presented Lemon Bay's assertion that a twelve-unit development was the only financially feasible way to recoup the costs of development, including the loan made to the prior owner. Appx13, Appx157, Appx3244. Lemon Bay did not apply for development permits from Charlotte County for its twelve-unit development, nor did it apply for a lease or other authorization from the State of Florida to construct a dock in state sovereign lands that the state designated an Aquatic Preserve. Appx158.

The Corps denied Lemon Bay's permit application with prejudice on February 1, 2016, finding that it did not comply with the section 404(b)(1) guidelines and was contrary to the public interest. Appx13, Appx1565. The Corps also emphasized the proposed project's risk to the West Indian manatee. Appx158, Appx. 1616-1618. Lemon Bay administratively appealed the decision on March 29, 2016. Appx13. The Corps found that the appeal had no merit on December 19, 2016. Appx13.

C. Proceedings below

Rather than challenge the Corps' denial of its permit request in court, Lemon Bay filed this suit alleging that the Corps had taken Lemon Bay's property. The CFC held a 10-day trial, Appx2 n.1, and concluded after trial that Lemon Bay had not established a taking. Appx1-27. The CFC therefore entered judgment for the United States. Appx28.

SUMMARY OF ARGUMENT

1. The Corps' denial of one specific permit application seeking to fill in 2.08 acres of wetlands to build a twelve-unit residential development did not take the 5.64-acre Lemon Bay parcel under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Instead, *Lucas* is reserved for those extraordinary cases in which the regulation permanently prohibits *all* economic beneficial use of the property. In denying Lemon Bay's twelve-unit development proposal, the Corps

did not foreclose any and all development plans or deprive Lemon Bay of all economic use of the parcel, as is required for a categorical taking under *Lucas*. The CFC therefore correctly concluded that Lemon Bay did not suffer a categorical taking under *Lucas*.

2. The CFC also correctly concluded that Lemon Bay failed to establish that the Corps' permit denial took Lemon Bay's property under framework announced in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *First,* Lemon Bay failed to demonstrate a reasonable, investment-backed expectation in its proposed development. Lemon Bay's predecessor and shareholder (IHT) acquired the property for a modest price in a 2010 foreclosure sale, from an owner (LeFave) who purchased the property for an equally modest price in a 1993 tax sale. Both prices reflected the existing federal, state, and local regulatory regime, which made a substantial development of the parcel unlikely. At the time of the purchase, Lemon Bay (and IHT) were well aware of the existing regulatory restrictions under the Clean Water Act and other federal, state, and local laws (as any reasonable investor would have been). IHT's prior ill-conceived investment in LeFave's proposed development did not alter that regulatory structure, which substantially limited development prospects on the date of IHT's acquisition of the parcel. Nor is the United States a guarantor against private

investment decisions by developers where development requires compliance with federal statutory requirements.

Second, Lemon Bay failed to show that the regulatory restrictions in this case, which are tied to natural physical conditions of the property that make it unsuitable for substantial development, are of the "character" of a taking. Among other things, Lemon Bay's development proposal failed to comply with the Section 404(b)(1) Guidelines and would adversely impact submerged waters of the state that provide important coastal habitat of the endangered West Indian manatee. The regulatory restrictions here limit harms to the environment and public interest that would occur from the proposed development use, without unfairly burdening Lemon Bay in relation to any reasonable investment-backed expectations, as none of the restrictions were unforeseen by Lemon Bay.

Third, Lemon Bay failed to demonstrate that that the Corps' permit denial caused it any significant economic impact. Lemon Bay proffered evidence of the value of the 5.64-acre parcel under a seven-unit development plan that was produced solely for trial purposes, was never presented to the Corps or to state or local regulatory officials, and was not likely to be approved. As the CFC held, Lemon Bay did not show that it was likely to receive the required state and local permits allowing either the twelve-unit development proposed to the Corps or the seven-unit development invented for trial. Particularly when the development was

proposed for a property that sold for $15,200 precisely because permits for significant development were unlikely. Considering all factors, Lemon Bay failed to show a regulatory taking under *Penn Central*.

3. Finally, Lemon Bay cannot segregate its supposed statutory right to bulkhead and fill from the rest of the property. That right was repealed by the Florida legislature in 1957. In any event, in takings cases the court must examine the property as a whole and not segregate out individual property rights from the "bundle of sticks" to find a taking. Finally, under this Court's cases, a federal restriction on a state-granted right does not by itself demonstrate a compensable taking by the United States.

STANDARD OF REVIEW

When reviewing a CFC takings decision, 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).

ARGUMENT

I. The CFC correctly concluded that Lemon Bay did not suffer a categorical taking under *Lucas*.

A. The CFC correctly applied *Lucas* and *Lost Tree* and found that the Corps' permit denial did not deprive Lemon Bay's property of all economic value.

The CFC correctly applied *Lucas* to conclude that the Corps did not permanently deprive Lemon Bay's property of all value when it denied Lemon Bay's application to fill in 2.08 acres of wetlands to build a twelve-unit residential development with a dock in a state aquatic preserve. In *Lucas*, the Supreme Court held that when a regulation deprives a property of all economic value the regulation is categorically a taking of the property. The Corps' action here was not the kind of complete deprivation of value that results in a categorical taking. Instead, *Lucas*' categorical rule is reserved for "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." 505 U.S. at 1017 (emphasis in original). As the Supreme Court reiterated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value," while the default rule is *Penn-Central*'s "more fact specific inquiry." 535 U.S. 302, 332 (2002). And "all value" means "all value"—the "categorical rule would not apply if the diminution in value

were 95% instead of 100%." *Tahoe-Sierra*, 535 U.S. at 330 (citing *Lucas*, 505 U.S. at 1019 n.8).

Lucas does not apply. *Lucas* involved a regulation that forbade any development at all, and the Supreme Court took it as a given that the regulation deprived the property of all economic value. 505 U.S. at 1006-08. The Corps' permit denial in this case, by contrast, addressed a grandiose twelve-unit single family residential development with a nine-slip dock. Appx1565, Appx1569. Rather than being based on a categorical refusal to allow development, the Corps' permit denial was based on a range of detrimental impacts from the specific project proposed, Appx18-19, including the Fish & Wildlife Service's determination that the dock was likely to impermissibly adversely affect the endangered West Indian manatee. Appx1613-1622, Appx585. To apply Lucas' categorical taking framework to a routine Clean Water Act permit denial—where the applicant proposes a project that is not water dependent and that would impact endangered species and then refuses to minimize or mitigate impacts to wetlands when a permit proposing less impacts to wetlands might be available—would make *Lucas* categorical takings commonplace rather than reserved for the extraordinary case.

Thus, the CFC correctly concluded that Lemon Bay had not met its burden of showing that the Corps' actions deprived its property of all value. Appx19. As the CFC concluded, the Corps merely denied Lemon Bay's *preferred* project; it did

not conclude that fill for development could *never* occur on Lemon Bay's property. *Id.* Lemon Bay did not prove that the denial of a single permit request deprived Lemon Bay's property of *all* economic value, as is required to demonstrate a categorical taking under *Lucas*. Appx18-20.

Lemon Bay asserts that this Court's decision in *Lost Tree* controls because there this Court held that a Corps' permit denial deprived the property of any economic value and resulted in a *Lucas* taking. Op. Br. 42-43. But this case is much different factually than *Lost Tree*. In *Lost Tree*, it was clear that the Corps would not give the specific applicant any permit for any development of its property. The Corps based its permit denial on the conclusion that the landowner "has had very reasonable use of its land at John's Island." *Lost Tree Vill., Corp. v. United States*, 707 F.3d 1286, 1291 (Fed. Cir. 2013) ("*Lost Tree II").* More specifically, the Corps concluded that the applicant "piecemealed his development and that reasonable use of the property has been achieved." *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 425 (2011) ("*Lost Tree I*"), *rev'd on other grounds at* 707 F.3d at 1291 (Fed. Cir. 2013). Underscoring that unique basis for denying the application at issue in *Lost Tree*, the Corps conceded at trial that "if an applicant other than Lost Tree had sought the permit, it would have been granted." *Id.*; *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219, 232 (2014) ("*Lost Tree III*") (holding that the Army Corps "singled out Lost Tree for adverse treatment"

because the Corps admitted that "had a different applicant requested a permit, the Corps would have responded favorably to the application"), *aff'd at* 787 F.3d 1111 (Fed. Cir. 2015). In doing so, the Corps eliminated 99.4% of the property's economic value, leaving only "residual value" unassociated with development and use of the lands. 787 F.3d at 1116. This Court held that was sufficient to constitute a *Lucas* categorical taking. *Id.*

Here, by contrast, the CFC found that the Corps has never said that Lemon Bay would not be granted any permit to use its land. Appx17-19. The possibility of a smaller development removes this case from the Corps' categorical denial of any permit in *Lost Tree*. As the CFC concluded, Lemon Bay has not shown that the Corps would deny a permit "no matter what the acreage or number of units," as had the landowner in *Lost Tree*. Appx19. Thus, Lemon Bay did not establish at trial that its property has no remaining value. *Id.*

Lemon Bay next asserts that in *Loveladies* the Claims Court refused to consider alternative permit possibilities when deciding whether a permit denial constitutes a categorical *Lucas* taking. Op. Br. 39-40 (citing *Loveladies*, 21 Cl. Ct. at 157). But that court was merely describing who bore the burden of proof, and ultimately concluded that the landowner there had proven that the Corps' permit denial had deprived the property of all economic value. Here, as the CFC concluded, Lemon Bay failed to meet that burden. The Supreme Court's decision

in *Palazzolo* is similar, as there the Court was clear that the "rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use," such that further "permit applications were not necessary to establish this point." *Palazzolo v. Rhode Island*, 533 U.S. 606, 621, 121 S. Ct. 2448, 2459, 150 L. Ed. 2d 592 (2001). Here, by contrast the CFC found after trial that the evidence did not support such a categorical finding that no permit would be available. Appx19. As explained in the next section, none of the CFC's findings on that point were clearly erroneous.

Finally, concluding that Lemon Bay suffered a categorical taking under *Lucas* here would convert every section 404 permit denial into a *Lucas* taking and shift the burden of proof from landowners to the United States. Both of those outcomes conflict with binding precedent. *See Tahoe Sierra*, 535 U.S. at 324 (holding that land-use regulations are "ubiquitous" and "[t]reating them all as *per se* takings would transform government regulation into a luxury few governments could afford"), *and Loesch*, 645 F.2d at 914 ("[T]he burden of proof rests on plaintiffs, and not on the defendant, to establish that a taking has occurred justifying the payment of just compensation") (citations omitted). Lemon Bay cannot shoehorn this case into the *Lucas* framework by seeking a permit that was

unlikely to be granted and then refusing to alter its proposal or to propose any project with less environmental impacts.

B. Lemon Bay's argument on appeal that the Corps would not have granted Lemon Bay any permit is unavailing.

Lemon Bay also questions several of the CFC's findings and argues that the Corps would not, as a factual matter, grant Lemon Bay any other fill permit, thus depriving its property of all economic value. Op. Br. 37-42. But the CFC's findings are all well supported in the record and show the Corps denied only the permit that Lemon Bay sought, and that Lemon Bay made no effort to propose any other less environmentally damaging development. Put simply, there is no clear error in CFC's factual findings.

First, it makes no difference to the analysis that the Corps denied Lemon Bay's permit request with prejudice. Op. Br. 37. As the CFC found, "the only application that the Corps denied with prejudice was the application to fill 2.08 acres and construct 12 units," Appx19, which neither precludes Lemon Bay from submitting an application for a project with a smaller footprint nor constrains the Corps' ability to approve such an application. This Court's decision in *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), is not to the contrary, as that case addressed the denial of a permit to mine on 98 acres of a 1,560 acre tract where the evidence demonstrated that it was "inevitable" that an application to mine on the rest would be denied. *Id.* Lemon Bay cannot show a

categorical *Lucas* taking by applying solely for a permit with a large footprint and a disfavored residential use that is denied, while an application for a smaller fill footprint or water dependent use might be granted and allow some economic use of the property.

Second, Lemon Bay cursorily restates its argument that applying for another permit would be futile because the Corps orally informed Lemon Bay that it would never grant a permit requiring the removal of mangroves from the property. Op. Br. 38. The CFC extensively considered the testimony on this subject and concluded that "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." Appx19. Lemon Bay makes no showing in its brief that the CFC's finding in this regard is clearly erroneous. And the evidence at trial fully supports the CFC's finding. There was no contemporaneous record of any such statement by the Corps. Appx18, Appx200, Appx296. Lemon Bay never referred to any such statement in its communications with the Corps, Appx200-203, Appx205-206, and did not raise it in its administrative appeal. The Corps' official action denied only the permit Lemon Bay applied for, Appx17-19, Appx1565, Appx1569, and the CFC found credible Mr. McElwain's testimony that he never told anyone on the Lemon Bay team that they could never be approved for any development on the property. Appx17-18, Appx584.

Third, Lemon Bay is incorrect when it asserts, without citation to the record, that the evidence indicates the Corps would have denied any fill permit. Op. Br. 38. Mr. McElwain also testified that the Corps does *not* have a policy forbidding impacts to mangrove wetlands. Appx584-585. Underscoring this point, Mr. McElwain testified that the Corps searched its records and found thirty-two times when the Corps permitted projects involving mangrove impacts in the Charlotte Harbor Estuary area, twelve of which had occurred since 2008. Appx17, Appx558. Nothing in the evidence supports Lemon Bay's bare assertion that any fill permit would have been denied, and certainly nothing shows that the CFC's contrary conclusion was clearly erroneous.

Next, Lemon Bay asserts that there was no water-dependent use to which it could have put the property and thus make permitting more likely. Op. Br. 38-39. But the CFC made no such finding, concluding instead that Lemon Bay's "persistence in limiting its proposed development to a 12-unit footprint" had "prevented the Corps' consideration of any other economically viable uses of the property." Appx20. It is also beside the point when inquiring into whether the Corps deprived the property of all economic value; a lack of a water-dependent use does not demonstrate that there were no less-intense, non-water-dependent uses for which Lemon Bay could have sought and received a permit. At bottom, there is no legal merit to Lemon Bay's suggestion that any further application would be futile.

Greenbrier v. United States, 193 F.3d 1348, 1359 (Fed. Cir. 1999*)* (futility limited to when "the administrative entity has no discretion regarding the regulation's applicability and its only option is enforcement" because "in such circumstances, no uncertainty remains regarding the impact of the regulation").

Finally, Lemon Bay incorrectly asserts that the CFC ignored evidence of Lemon Bay's efforts to minimize and mitigate the wetlands impacts of its development proposals. Op. Br. 41-42. Instead, the record shows, as the CFC concluded, that the Corps repeatedly asked Lemon Bay to show why the project could not be minimized to reduce impacts to the aquatic environment but never received any satisfactory response. Appx18-19. For example, the Corps asked Lemon Bay to submit an analysis evaluating off-site alternatives and to demonstrate that the onsite fill was the minimum necessary. Appx3134-3135. In response, Lemon Bay told the Corps that developing the property was the only way to recoup money lost to Mr. LeFave, so it could not avoid the onsite wetlands. Appx155, Appx3154-3155. Lemon Bay identified three alternative sites, two of which were unavailable. Appx3157; Appx571 (noting that the Corps does not typically consider unavailable sites when assessing an alternative). Lemon Bay also threatened that the Corps' refusal to grant a permit for development on site would result in a takings, Appx3157, and told the Corps that it considered the

twelve unit development the minimum for an economically viable project, Appx3163, Appx572.

Rather than offering any alternative or minimized developments for the site, Lemon Bay opted to *increase* the proposed impacts of the project in early 2013 by adding a boat dock in the Lemon Bay Aquatic Preserve. Appx155, Appx201, Appx370. Lemon Bay originally planned to propose this same dock to the Water Management District, but was told not to do so because the dock would push the project into a heightened review category that would require approval by the Trustees—that is, the Florida Governor and cabinet. Appx150; Appx195, Appx370. Yet Lemon Bay proposed the dock to the Corps and insisted that the dock made the project water dependent. Appx201. The Corps disagreed, Appx3197, and informed Lemon Bay that the added dock would result in a "take" of the West Indian manatee, which is not allowable under the Endangered Species Act or Marine Mammal Protection Act. Appx574, Appx3185. The Fish & Wildlife Service reached the same conclusion: that Lemon Bay's property did not have any upland shoreline that would allow for the construction of docks. Appx576, Appx3191-3193. The Corps advised Lemon Bay that if it removed the docks, there would no longer be concerns related to the manatee. Appx576-577, Appx3212. But Lemon Bay refused. Appx202.

In the face of Lemon Bay's refusal to cooperate with the regulatory process, the Corps denied Lemon Bay's development request because of Lemon Bay's failure to comply with the Section 404(b)(1) Guidelines and the effects on manatee. Appx584, Appx1624-1625 (explaining lack of compliance with section 404(b)(1) guidelines). But in doing so, as the CFC found, the Corps did not foreclose Lemon Bay from developing its property nor did the Corps effect a categorical taking. Appx19. To be sure, Lemon Bay was intent on pursuing a development proposal sufficient to allow it to recoup its initial investment (in the project proposed by Lafave when Lefave owned the land). But that is not the relevant question under *Lucas*. Even if Lemon Bay were correct that the Corps' regulatory action amounts to the denial of any development proposal that will allow Lemon Bay to recover its original investment (prior to its ownership of the property), that evidence does not demonstrate a denial of all economic value of the property, and thus does not demonstrate a *Lucas* categorical taking.

Lemon Bay's conduct here is much like the "obdurate behavior" that frustrated the takings claim in *Mehaffy v. United States*, 102 Fed. Cl. 755, 768 (2012), aff'd 499 Fed. Appx. 18 (Fed. Cir. 2012). In *Mehaffy*, this CFC concluded that there was no taking where the applicant "was, at best, uncooperative with the Corps, and to this day has not taken the steps of explaining why the wetlands portion of the subject property needs to be filled to effectuate his development plan

or commissioning a survey to demonstrate the effects of this action." *Id.* Because of this "obdurate behavior in the face of repeated requests for information, the Corps denied the fill permit." *Id.* But *Mehaffy* also recognized that the resulting denial "does not forever foreclose plaintiff from developing his property, nor does it effectuate the categorical taking that plaintiff implicitly argues." *Id. See Macdonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 353 n. 9 (1986) ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."). So too here.

C. Lemon Bay's ability to participate in Charlotte County's transfer of density unit program shows that there are economically productive uses for the property.

Lemon Bay (supported by the Pacific Legal Foundation in an amicus brief) argues preemptively that the sale of a transfer of density unit ("TDU") is not an economically beneficial land use. Op. Br. 45-46. The CFC did not reach that issue, Appx20-21, and there is no need for this Court to reach it either. First, if this Court affirms the CFC's conclusion that the Corps' permit denial did not deprive Lemon Bay of all economic uses of its property, then there is no need to reach the TDU issue. Second, if the Court reverses the CFC, then it should remand for that court to determine the economic value of the TDUs and their relevance in the first instance.

If this Court decides the issue, it should hold that TDUs are an economically valuable use of the land that can be considered in determining whether a taking

occurred. An economic use is something that "enable[s] a landowner to derive benefits from land ownership." *Lost Tree IV*, 787 F.3d at 1117. Thus, transfer of density rights "undoubtedly mitigate whatever financial burdens the law has imposed on [landowners] and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Cent*., 438 U.S. at 137. Contrary to Lemon Bay's and Pacific Legal Foundation's assertions, Justice Scalia's concurring opinion in *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., concurring), does not abrogate the holding of *Penn Central*, 438 U.S. at 137, that the transfer of development rights—like the transfer of density units available under the Charlotte County program—are relevant to economic value. *See Good v. United States*, 39 Fed. Cl. 81, 107-08 (1999), aff'd 189 F.3d 1355 (Fed Cir 1999) ("While the concurring justices in *Suitum* clearly indicate opposition to this proposition, their opinion underscores the Court's reaffirmance of the *Penn Central* holding that the values of [transfer of density rights] is to be considered to answer the threshold question of whether a taking has occurred.").

Thus, *Penn Central* directs this Court to explore whether transfer of development rights—like Charlotte County's transfer of density program—mitigate the financial burdens of land regulation. Lemon Bay's property qualifies for the certification of 42 high-value transferrable density units. Those units would have an advantage over the vast majority of other certified units, because they can

be used in West County, in the Coastal High Hazard Area, and in certain FEMA flood designations. There is a publicly documented need for such units that cannot be met with the existing inventory of certified units. Appx743 (explaining the prospective need for TDUs for the McCall Town Center development), Appx1039-1041. Thus, even though the CFC concluded that it could not quantify the value of the TDUs on the evidence presented, if this Court reaches the issue, it should hold that the qualitative value alone is sufficient to defeat any claim that *Lucas*'s categorical rule should apply.

II. The CFC correctly concluded that Lemon Bay did not suffer a regulatory taking under *Penn Central*.

When the Corps denied Lemon Bay's application for a Clean Water Act permit it did not take Lemon Bay's property under *Penn Central*. As this Court has explained, under *Penn Central* "courts use a three-factor analysis to assess claimed regulatory takings: (1) character of the governmental action, (2) economic impact of the regulation on the claimant, and (3) extent to which the regulation interfered with distinct investment-backed expectations." *Cienega Gardens v. United States*, 331 F.3d 1319, 1337 (Fed. Cir. 2003). The CFC thoroughly considered those factors and correctly concluded that none weighed in favor of a taking. This Court should affirm.

A. Lemon Bay failed to show any distinct, objectively reasonable, investment-backed expectation in development of the property.

In any regulatory takings claim, the landowners must show that the challenged regulation has frustrated distinct, objectively reasonable, investment-backed expectations held at the time of investment. *See Loveladies Harbor v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994); *see also Cienega Gardens*, 331 F.3d at 1346 (concluding that the reasonable investment-backed expectations test is "objective"). "[T]he complete absence of reasonable distinct investment-backed expectations can weigh sufficiently heavily to be dispositive of a takings claim." *Anaheim Gardens, LP v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020) (citing *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1005 (1984)).

As the CFC correctly concluded, Lemon Bay "failed to prove that it had a reasonable investment-backed expectation in developing its wetland property without being subject to the regulatory permitting requirements." Appx23. The CFC concluded that when Lemon Bay acquired the property it was aware of the Clean Water Act's restrictions and therefore lacked any reasonable expectation of filling two acres of high-quality mangrove wetlands for a non-water-dependent residential housing development. *Id.* Lemon Bay contends that the CFC improperly and exclusively focused on Lemon Bay's knowledge of the preexisting regulatory regime while ignoring other testimony of Lemon Bay's reasonable expectations for

development. To the contrary, the CFC's conclusion is consistent with the governing law and is well-supported in the record.

1. The CFC correctly applied the law.

The CFC committed no legal error. The "reasonable investment-backed expectations" prong is designed to limit recovery to "'owners who c[an] demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Loveladies Harbor*, 28 F.3d at 1177. Indeed, "'it is particularly difficult to establish a reasonable investment-backed expectation' if the property was acquired after the alleged regulatory restriction." *Anaheim Gardens*, 953 F.3d at 1350 (quoting *Norman v. United States*, 429 F.3d 1081, 1092-93 (Fed. Cir. 2005)). Thus, while a "valid takings claim will not evaporate just because a purchaser took title after the law was enacted, the timing of the purchase and purchaser's knowledge are relevant considerations in determining whether a purchaser had reasonable investment-backed expectations with which the government's regulatory action interfered." *Id.* (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017)); *see also Concrete Pipe and Prods. of Calif., Inc. v. Constr. Laborers' Pension Tr. for S. Calif.*, 508 U.S. 602, 645 (1993). "The logic behind this idea is straightforward: 'One who buys with knowledge of a restraint assumes the risk of economic loss.'" *Mehaffy v. United States*, 102 Fed. Cl. 755, 767 (2012), aff'd, 499 F. App'x 18 (Fed. Cir.

2012) (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)). "[T]o 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." *Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 76-77 (1997).

By the time Lemon Bay acquired the Property, the longstanding Clean Water Act section 404 permitting regime had dimmed the prospect of receiving a permit to fill more than two acres of important mangrove wetlands for a twelve-unit housing development. *See Cienega Gardens*, 331 F.3d at 1346. The Clean Water Act's regulations require that when an applicant proposes to fill wetlands for an activity that is not water dependent, the Corps presumes that less environmentally damaging practicable alternatives are available "unless clearly demonstrated otherwise." Appx154 (quoting 40 C.F.R. § 230.10(a)(3)). In addition to the Clean Water Act, which the CFC found sufficient to demonstrate Lemon Bay did not have any reasonable investment-backed expectations, three other regulatory regimes similarly show that Lemon Bay's expectations were not reasonable. The State of Florida has regulated wetlands since the 1970's under its Environmental Resource Permit program. Fla. Stat. Ann. § 373.4131 (West 2020). Florida regulates construction in state sovereign lands, requiring authorization in the form of a lease from the Trustees (the Governor and Cabinet) for the kind of

dock Lemon Bay proposed. Appx155. And Lemon Bay's residential development had to comply with Charlotte County's Comprehensive Plan and Land Development Regulations. Appx2297 (Charlotte Cnty., Fla. Code of Ordinances art. 1, § 3-9-7(e)(3)). Under that regime, development of the Category I wetlands is restricted "to cases where no other feasible and practicable alternative exists that will permit a reasonable use of the land," "regardless of any other regulatory agency authorization." Appx1144-1145 (ENV Policy 3.1.3). It is for those reasons that Mr. LeFave's own consultant (DMK) advised him that his residential development would "not be easy to permit" and contained "red flags." Appx3, Appx23. When Lemon Bay took over ownership of the property, DMK told Lemon Bay the same thing. Appx3313, Appx23.

This Court has repeatedly held that a property owner's expectation to fill wetlands for a non-water-dependent use after the Section 404(b)(1) Guideline's enactment is unreasonable. *See Norman*, 429 F.3d at 1092-93 (holding it unreasonable to expect to fill wetlands for commercial and residential construction); *Good v. United States*, 189 F.3d 1355, 1362-63 (Fed. Cir. 1999) (holding that the expectation to fill wetlands for residential construction was unreasonable); *Forest Props., Inc., v. United States*, 177 F.3d 1360, 1366 (Fed. Cir. 1999) (deeming the expectation to construct housing on reclaimed lake bottom

unreasonable); *Mehaffy*, 499 F. App'x at 22 (holding that the expectation to fill wetlands without meeting the Clean Water Act criteria is unreasonable).

Despite the extensive case law supporting the CFC's decision, Lemon Bay contends that the CFC acted contrary to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), because under *Palazzolo* knowledge of a preexisting regulatory regime is "not necessarily dispositive of the reasonableness of a landowners expectations." Op. Br. 47 (quoting *Palazzolo*, 533 U.S. at 608). Lemon Bay misstates the relevance of *Palazzolo* here. The CFC did not hold that the existence of the Clean Water Act and Lemon Bay's knowledge of it was dispositive, concluding instead that it was a "significant factor" in determining whether Lemon Bay's expectations were reasonable. Appx23. That aligns with *Palazzolo*, as that case "does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis." *Id.* at 633 (O'Connor, J. concurring), quoted in *Tahoe-Sierra*, 535 U.S. at 336. Indeed, this Court has held post-*Palazzolo* that "it is particularly difficult to establish a reasonable investment-backed expectation" with knowledge of the "applicable wetland restrictions," *Norman*, 429 F.3d at 1092-93, and that a "property owner who buys 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.'" *Mehaffy*, 499 F. App'x at 22

(quoting *Loveladies Harbor*, 28 F.3d at 1177). The CFC thus correctly applied the law, and *Palazzolo* is not to the contrary.

Second, the CFC's factual conclusion that, given the preexisting regulatory regime, Lemon Bay had not proven that it held a reasonable investment-backed expectation for a residential development is well supported in the trial record. As the CFC found, Lemon Bay was aware when it acquired the property in 2011 that the Clean Water Act and the section 404 regulations had been in place for more than 25 years. Appx23, Appx181. IHT was aware of the same when it made the loan to Mr. LeFave in 2008 and when it acquired the property. Appx192. Lemon Bay also knew that, when considering section 404 permit applications, the Corps cannot authorize the discharge of fill if there is a practicable alternative that would have less adverse impacts to the aquatic ecosystem. Appx198. And Lemon Bay knew that the Corps presumes that less environmentally damaging practicable alternatives exist for projects that are not water dependent unless the applicant clearly demonstrates otherwise. Appx199. Lemon Bay, and its predecessor IHT, knew about the Clean Water Act's restrictions and the nature of the site and could not have reasonably expected to fill in the wetlands for the residential development it proposed. See *Norman*, 429 F.3d at 1092-93; *Forest Props.*, 177 F.3d at 1362-63.

2. The CFC's factual findings were not clearly erroneous.

The CFC correctly applied the law to those facts, but Lemon Bay says the CFC overlooked several facts supposedly supporting the reasonableness of its expectations for development. Op. Br. 47-49. None is persuasive. First, Lemon Bay cannot base its claim to reasonable investment-backed expectations on its alleged right to bulkhead and fill. Even if Lemon Bay could prove that it has some right to bulkhead and fill based on a statute repealed fifty years before it acquired the property, that statutory allowance "was at all times a legitimate public concern" and thus "subject to reasonable regulation under the police power." *Zabel v. Pinellas Cty. Water & Nav. Control Auth.*, 171 So. 2d 376, 379 (Fla. 1965). So even if a prior owner (like Mr. Stanford) might have expected to fill in this land without federal approval, "the [Clean Water Act] altered th[at] expectation . . . for all landowners." *Mehaffy*, 499 F. App'x at 23. Thus, Lemon Bay "is in the same position as other property owners and has no expectation to fill his wetlands without first obtaining a permit under the [Clean Water Act]." *Id.*

The same problem infects Lemon Bay's citation to the property's zoning and Charlotte County's (expired) preliminary approval of Mr. LeFave's development: neither speak to whether Lemon Bay could have reasonably expected to develop its property given the Clean Water Act's restrictions. A preliminary site plan approval subject to conditions is not that difficult to obtain. Appx660-661, Appx667. And

despite state and federal permits being express conditions of the preliminary approval he obtained, Appx1085, Mr. LeFave did not submit a permit application to the Corps, Appx373. Moreover, Charlotte County overhauled and strengthened its regulation of wetlands after its preliminary approval of Mr. LeFave's plan, and before Lemon Bay acquired the site. Appx849. Those more restrictive regulations would have applied to Lemon Bay's site development approval application. Appx193.

Lemon Bay also relies on a 2011 appraisal valuing the property at $4,470,000, Op. Br. 48, but the CFC explicitly found that reliance on that appraisal was unreasonable because the 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." Appx23. Thus, there was "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." *Id.* The most recent sale of the property had been for a mere $15,200. Appx146. Lemon Bay does not explain on appeal how the CFC's findings related to the appraisal were clearly erroneous.

Finally, Lemon Bay's reliance on surrounding development is of no help. The Parties stipulated that the northwest portion of Sandpiper Key, including the area where the condominium and most of the development on the island is located, was filled in before 1970, and thus before the Clean Water Act. Appx143. That development can therefore have no reasonable bearing on Lemon Bay's expectations, as it acquired the property nearly forty years later and well after enactment of the Clean Water Act.

Indeed, the notion that Lemon Bay could have reasonably relied on surrounding development is belied by the prior unsuccessful efforts to develop this property. By 1970, the northwest portion of Sandpiper Key had been filled, but the balance of the island, including the property here, had not. The owner at that time, Mr. Stanford, spent much of the 1970s unsuccessfully attempting to obtain authorizations to fill in the rest of Sandpiper Key, including Lemon Bay's property. Appx3408 (public notice for Stanford proposal); Appx3410 (citizen objections); Appx3453 (Stanford permit application materials); Appx3502-3504 (1972 letters to State seeking permits); Appx3509 (1974 letter seeking permits). The next owner quit paying taxes on the property, Appx144, and after Mr. LeFave acquired the property at the tax auction he too failed to develop the property and ultimately lost the site to foreclosure. Appx3110, Appx144-146. IHT outbid another prospective purchaser to acquire the site for just $15,200. Appx146. These

low sales prices from two distressed sales coupled with the history of the property from the 1970s onward reflect what the market knew: that tightening regulatory restrictions on wetlands made substantial development of the site unlikely. Lemon Bay was aware or should have been aware of that history and the regulatory constraints at the time it acquired the property in 2011. *See*, *e.g.*, *Allenfield Assocs. v. United States*, 40 Fed. Cl. 471, 484 (1998) (holding that defendant was put on constructive notice of the terms of a publicly recorded lease).

Though not reached by the CFC, Lemon Bay also lacks any *investment-backed* expectations. When a regulatory restriction predates an owner's acquisition, "the owner presumably paid a discounted price for the property . . . [and] [c]ompensating him for a 'taking' would confer a windfall." *Creppel*, 41 F.3d at 632. Lemon Bay acquired the property for the token consideration of ten dollars. Appx146. Lemon Bay's predecessor-in-interest, IHT, acquired the property at a foreclosure auction for $15,200 in 2010. Appx146, Appx211 (testifying that IHT chose to bid at the foreclosure sale to obtain the property). And IHT's predecessor-in-interest, Mr. LeFave, acquired the property at tax sale for $12,100 in 1993. Appx144. As discussed above, those transactions, taken in the context of the regulatory background, are incompatible with a reasonable investment-backed expectation that waters of the United States could be filled to accommodate the proposed residential development. Instead, the disparity between

actual sales and Lemon Bay's claimed value demonstrates that market participants understood that substantial development was unlikely. A mere $15,200 is all this property could command at auction, even with another bidder present. Appx146, Appx211. IHT's $15,200 investment does not support Lemon Bay's claimed expectation to a $3.8 million development.

B. The character of the government action in this case does not support a taking.

The CFC also correctly concluded that the character of the government action supports the government in this case. To determine the character of the government action requires the court to consider "the purpose and importance of the public interest underlying [the] regulatory imposition, . . . obligating the court to inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented." *Maritrans v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003). This factor tips toward the plaintiff only when the burdens of individual landowners "are so substantial and unforeseeable" that justice and fairness "require that they be borne by the public" as a taking. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984).

It is well settled, and Lemon Bay does not contest, that the government "clearly has a legitimate public welfare duty to preserve the nation's wetlands." *See Forest Props.*, 39 Fed. Cl. at 76; *Fla. Rock Indus., Inc. v. United States*, 791

F.2d 893, 904 (Fed. Cir. 1986) (en banc) ("the preservation of wetlands bears a substantial relationship to the public welfare as perceived by the best lights of our time"). Thus, the existence of the section 404 regulatory program "indisputably serve[s] an important public purpose—one which benefits plaintiff as members of the public at large." *Brace v. United States*, 72 Fed. Cl. 337, 356 (2006) (citations omitted).

The CFC correctly found that regulation of Lemon Bay's property furthers that government interest because the property "contains Category I wetlands and mangroves" that had been "designated as an essential fish habitat and an aquatic resource of national importance." Appx24. The CFC also credited the testimony of Mr. Sramek, a biologist from the Fisheries Service who consulted with the Corps on the Lemon Bay permit decision, that the property "contains overall high-quality, functioning mangrove wetlands." Appx24, Appx672, Appx3124. Lemon Bay says that finding is "suspect" given evidence that "the mangroves were previously impacted by fill and by mosquito ditching," Op. Br. 51, but the CFC found otherwise, crediting Mr. Sramek's testimony—which was based on the interagency site inspection that Mr. Sramek conducted on the property in May 2012—that there was "very little anthropogenic or human use evidence that the mangroves had been impacted." Appx24, Appx673. And Mr. Sramek added that the mangroves "were mature" and "fairly tall," and that he saw no evidence that there were "any impacts

or restriction of tidal flow throughout the mangroves." Appx673. Lemon Bay does not explain how those findings were clearly erroneous. The Corps' action here in denying the fill of wetlands on the property advanced the goals of the section 404 regulatory regime.

Not only did the permit denial advance the goals of the Clean Water Act, it also advanced the goals of the Endangered Species Act and the Marine Mammal Protection Act. The U.S. Fish & Wildlife Service, using a federal guideline called the Manatee Key, also concluded that the proposed dock structure was likely to adversely affect and take the West Indian manatee. Appx3191, Appx884. The proposed project was therefore "inconsistent with both the Endangered Species Act and the Marine Mammal Protection Act." Appx3185, Appx1636-1638.

Despite Lemon Bay's assertion that the Corps' permit denial represents a private burden borne in service of the public good, Lemon Bay failed to show that it was made to bear any such burden unfairly. As the CFC concluded, a burden is unfair only if it is both "so substantial and unforeseeable that it must be borne by the public." Appx24 (quoting *Kirby Forest Indus.*, 467 U.S. at 14). Any burden on Lemon Bay here was neither substantial nor unforeseeable. The CFC correctly found that any economic burden to Lemon Bay was caused by circumstances of Lemon Bay's own making, not the Corps' permit denial, because it stemmed directly from Lemon Bay's desire to offset "the financial outlay on I.H.T's

defaulted loan and its resultant inability to minimize the project's impacts on wetlands." Appx24. As the CFC found, Lemon Bay's desire to recoup on a bad business deal is not a substantial burden that ought to be borne by the public. *Id.*

Similarly, any such burden was entirely foreseeable. The Clean Water Act was enacted in 1972 and the Corps issued detailed regulations governing the issuance of section 404 permits in 1986, but IHT bought the property at foreclosure in 2010. *Compare* Appx153 *with* Appx146. Further, IHT knew about the Clean Water Act and the section 404(b)(1) regulations' applicability when it chose to buy the property at auction. Appx23-24. Thus, Lemon Bay was not thrust unwillingly or unwittingly into the Clean Water Act regulatory landscape; it acquired the property knowing that it would be subject to a well-established set of constraints. And consistent with these long-standing regulations, the Corps denied Lemon Bay's section 404 permit application, finding that Lemon Bay had not shown under the 404(b)(1) Guidelines that its project was the least environmentally damaging practicable alternative because Lemon Bay failed to show that proposed impacts could not be avoided or further minimized. Appx1641-1644, Appx1653. As the CFC concluded, Lemon Bay's burden "due to the permit denial was foreseeable." Appx24.

Given the CFC's findings, this case is easily distinguishable from *Florida Rock Industries*, on which Lemon Bay primarily relies. Op. Br. 51-52. In that case,

Florida Rock bought its property before the Clean Water Act, and this Court concluded that neither that Act nor its regulations were foreseeable. 791 F.2d at 895. Here, by contrast, Lemon Bay sought to make up for a bad bet on a loan by proposing to fill in high quality mangrove wetlands for a residential development with full knowledge of the longstanding regulatory regime governing the property. The CFC correctly concluded that the resulting burden was not substantial, not unforeseeable, and should not be borne by the public rather than Lemon Bay. *Florida Rock* is thus of no help to Lemon Bay.

C. The economic impact of the Corps' section 404 permit denial is not enough to constitute a regulatory taking.

Finally, the CFC correctly concluded that Lemon Bay has not shown sufficient economic impact to its property such that the Corps' denial of Lemon Bay's requested section 404 permit is a regulatory taking. "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). The economic impact of regulation is "measured by the change, if any, in the fair market value caused by the regulatory imposition." *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (citations omitted). "To assess the severity of a regulation's economic impact, the court must compare the value of the property immediately before the government action that is alleged to cause the taking with the value of the same property immediately after

the government action." *Love Terminal Partners, LP v. United States*, 889 F.3d 1331, 1343 (Fed. Cir. 2018) (citing *A&D Auto Sales*, 748 F.3d at 1157). "This economic inquiry relates not to the amount of compensation, but to whether a taking has occurred at all." *Love Terminal*, 889 F.3d at 1343.

1. Lemon Bay failed to establish the value of its property absent the Corps' permit denial and thus failed to show significant economic impact stemming from that denial.

Despite acquiring the property for $10 from a predecessor that paid $15,200 at a foreclosure sale, Lemon Bay contends that its property should be valued at $3.8 million on the date that the Corps denied its permit application to measure its economic loss. But Lemon Bay failed to establish that value at trial. The $3.8 million figure assumes that Lemon Bay could have built a residential development if it obtained the Corps permit, when in fact Lemon Bay lacked the requisite state and local permits to do so. The CFC rightly rejected that effort to value Lemon Bay's property. As the CFC concluded, immediately before the Corps' permit denial Lemon Bay did not have an ERP from the Southwest Florida Water Management District for a residential development with a dock, an approval to build a dock in state-owned waters, or an approval from Charlotte County to develop its property. Appx25-26. And Lemon Bay did not prove that it had any reasonable prospect of ever obtaining any of those permits. *Id.* As a result, Lemon Bay did not establish that its land ought to be valued as if those permits existed and

therefore did not establish that the Corps' permit denial had any significant economic impact on the value of the property. *Id.* The economic impact factor thus weighed in favor of the government. *Id.*

Lemon Bay first contends that the CFC deviated from this Court's case law when it required Lemon Bay to demonstrate that it had a reasonable prospect of obtaining the required state and local permits for the proposed use that undergirded its valuation of its property. Op. Br. 52-55. But none of the cases Lemon Bay cites support its argument. In *Ciampetti v. United States*, 18 Cl. Ct. 548 (Fed. Cl. 1989), for example, the Claims Court concluded that the United States could not avoid liability for a taking just because the state had also declined to issue permits. But that is not what the CFC concluded here. Instead, the CFC concluded that Lemon Bay's evidence of a $3.8 million value for its property was insufficient where it could not show that it had a reasonable prospect of obtaining the required state and local permits for the development that undergirded its valuation. Appx26-27.

That conclusion makes good sense, given the evidence here. Lemon Bay proffered the value of a seven-unit development as if fully permitted and horizontally constructed with a dock in sovereign lands that Lemon Bay had (and has) no right to occupy. Appx485, Appx479. In making its proffer of economic harm, Lemon Bay thus conveniently stripped away the risk that the state or the county would not approve a twelve- or seven-unit development with a dock.

Appx485. Ignoring that risk was particularly problematic because the reason that the dock was removed from the application to the Southwest Florida Water Management District was to *avoid* heightened state regulatory review. Appx150, Appx370, Appx195-196.

Moreover, no federal, state, or local regulatory agency has ever considered the seven-unit development proposal that Lemon Bay developed for trial. Appx369, Appx482, Appx157-158. Nor has any federal, state, or local regulatory authority authorized construction of a dock in the Lemon Bay Aquatic Preserve. Appx152, Appx158, Appx480, Appx369. Indeed, the seven-unit project that Lemon Bay's experts rely on to justify the $3.8 million figure has *more* impacts to submerged lands (because it includes a dock) and features *less* mitigation than the project the Water Management District approved. Appx492, Appx370-372. *Compare* Appx1490 (original mitigation of 1.63 acres for the 2012 Environmental Resource Permit), *with* Appx492 (proposing 1.57 acres of mitigation in appraisal addendum offering during trial). Nor did the Environmental Resource Permit authorize construction of a dock at the property, Appx152, requiring modification to do so, Appx3511, even though Lemon Bay's appraiser acknowledged that boat access is "very important" to valuation. Appx486.

Relying entirely on its made-for-trial proposed development to establish value, Lemon Bay did not proffer any evidence of any sale of a tract of vacant

wetlands and submerged lands that was either converted or convertible to residential use. Appx479, Appx981. The only testimony that approaches relevance to the correct framing of economic impact is Mr. Goertz's testimony that the sale of the property without an approved development plan could not recover the $875,000 judgment entered against Mr. LeFave. Appx194. Suffice it to say, a number *below* $875,000 is lower than the $3.8 million Lemon Bay claimed as the measure of its economic harm.

The decisions on valuation in *Lost Tree* and *Loveladies* also do not help Lemon Bay here. Op. Br. 54-55. *Lost Tree* involved arriving at a valuation for the property where the only permit missing was the Corps permit, and thus the CFC concluded that it would not value the property accounting for the *Corps* denial of a permit because the government "may not lower the fair market value of [a property] by relying on the possibility of the very taking at issue." *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219, 231 (2014), *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015). As the court explained, that was "especially true" there because, "except for the Section 404 permit denial, [the property] feasibly could have been put to its highest and best use and it had obtained all of the other necessary permits and approvals." *Id.* Similarly, in *Loveladies* the court rejected an argument that value of the property should be reduced by the failure to obtain "the very permit

approval by the Army Corps of Engineers" that was at issue in the case. 21 Cl. Ct. at 156.

But that is not at all like this case. Lemon Bay *did not have* all of the other necessary permits and approvals, and it is not the "very taking at issue" or the Corps' permit denial that reduces the value of the property. Instead, the problem is Lemon Bay's failure to show any reasonable prospect of obtaining state and local approvals for the project forming the basis of Lemon Bay's valuation.

2. The CFC's factual findings were not clearly erroneous.

Lemon Bay next contends that the CFC's finding that Lemon Bay was not likely to receive the necessary permits for its proposed seven-unit development was clearly erroneous. Op. Br. 55-58. To the contrary, that finding was well-grounded in the record. Put simply, Lemon Bay did not prove that the value of its property rose from $15,200 in 2010 to $3.8 million in February 2016 just before the Corps' permit decision. Instead, it offered implausible, speculative testimony on the projected income capitalization of a seven-unit residential development that Lemon Bay never even suggested to the Corps during the permitting process.

The actual use of the property on the date of the alleged taking was *not* residential. Appx478. In addition to the Clean Water Act's regulatory regime, the Lemon Bay property has faced increasing state and local land use restrictions that frustrate a seven-unit residential development with boat dock. Lemon Bay does not

own the land on which it intends to construct its dock. Appx155. And the owner of that land—the State of Florida—has designated the land on which Lemon Bay hopes to construct its dock as part of the Lemon Bay State Aquatic Preserve. Appx141, Appx150, Appx155. It is because of that state designation that the Southwest Florida Water Management District persuaded Lemon Bay's predecessor-in-interest to *remove* the dock from the twelve-unit development proposal envisioned in the 2012 Environmental Resource Permit. Appx195, Appx370, Appx572. No regulatory body has authorized the construction of a dock at the Lemon Bay property, Appx152, even though Lemon Bay's appraiser acknowledges that boat access is "very important," Appx486.

In addition, Lemon Bay's twelve- and seven-unit developments require approval from Charlotte County. Appx374, Appx774-775. But amendment of Charlotte County's Comprehensive Plan after expiration of Mr. LeFave's preliminary approval and before Lemon Bay's acquisition of the property imposes several restrictions on allowable wetlands impacts. Appx374, Appx849.

The CFC credited the testimony of Mr. Vincent that state and local regulatory approvals were not likely forthcoming. Appx25-26. Mr. Vincent opined, consistent with the contemporaneous admission of Lemon Bay's consulting firm, that "the majority of the site contains Category 1 wetlands." Appx846-847 (discussing Appx1207 (DMK Feasibility Report)). Mr. Vincent contrasted efforts

of other developers whom Charlotte County allowed to impact some Category I wetlands (after showing avoidance and minimization) with Lemon Bay's refusal to show that filling Category I wetlands for residential development was the only feasible and practicable alternative that permitted a reasonable use of the land. *Compare* Appx845 (discussing the Sunseeker Development), *with* Appx853 (discussing application of ENV Policy 3.1.3 to Lemon Bay's development proposals). Mr. Vincent added that Plaintiff's seven-unit development is inconsistent with ENV Policy 3.1.5, CST Policy 1.1.2, CST Policy 1.1.3, CST Policy 1.1.4, CST Policy 1.1.5, and CST Policy 1.1.9. Appx858-860. Based on the refusal of Lemon Bay's predecessor-in-interest to avoid or minimize impacts to wetlands, Mr. Vincent credibly opined that Charlotte County likely would not approve the seven-unit development, Appx861-862, and the CFC concluded that testimony was persuasive, Appx26.

Lemon Bay argues, Op. Br. 57-58, that the CFC should have instead credited the testimony of Dr. Depew that the permitting needed to convert the use of Lemon Bay's property to residential was a "near certainty." Appx368. But the CFC chose not to credit that testimony, and Lemon Bay does nothing to establish that the CFC's credibility findings were clearly erroneous. Indeed, at least three analytical flaws pervaded Dr. Depew's testimony. First, Dr. Depew did not familiarize himself with important events in the history of this property. For example, Dr.

Depew did not conduct a title search to learn about the property and he was, therefore, unaware of the publicly recorded documents showing the prior landowners' unsuccessful efforts to bulkhead and fill the Lemon Bay property in the 1970's and afterward. Appx385. Moreover, Dr. Depew's reports ignored the fact that Mr. LeFave, a land developer who was Lemon Bay's predecessor-in-interest, lost the property in foreclosure. Appx380. Also missing from Dr. Depew's analysis is that Mr. LeFave bought the property at tax sale when yet another predecessor-in-interest land developer—Sandpiper Key Associates—forfeited the property. Appx380.

Second, Dr. Depew's repeated reliance on the 2007 preliminary approval from Charlotte County, Appx1082-1099, Op. Br. 56-57, is not persuasive. Charlotte County's preliminary approval was conditioned on compliance with several regulations that Dr. Depew did not show the seven-unit development would satisfy. Appx372, Appx660-661. Dr. Depew did not evaluate public opposition to Mr. LeFave's 39-unit development, Appx373, even though public opposition existed, Appx374 (citing Appx3113), and has derailed development projects in the past, Appx484. More importantly, Mr. LeFave's preliminary approval expired. *See* Appx372 (citing Appx1086). And expired preliminary approvals are afforded *no* deference in subsequent County reviews. Appx2830 (Land Develop Code § 3-9-7(d)).

Further, the County's environmental regulations of wetlands were amended after Mr. LeFave's preliminary approval expired and before Lemon Bay acquired the property. Appx374, Appx655. The County's new Comprehensive Plan places Lemon Bay's property in the most protected category of wetlands –Category I— and so requires avoidance and minimization of impacts. Appx374, Appx657, Appx1145-1147. Because of the property's likely classification as a Category I Wetland under the new Comprehensive Plan, *see* Appx1207 (DMK Feasibility Report), dredging and filling of the property is limited "to cases where no other feasible and practicable alternative exists that will permit a reasonable use of the land." Appx1145 (ENV Policy 3.1.3). Yet Dr. Depew made no effort to show whether any project with less than 1.95 acres of fill is practicable or feasible. Appx375. And Dr. Depew did not explore the reasonableness of alternative uses of the land, other than the twelve- and seven-unit developments. Appx576. Nor did Dr. Depew identify any alternative use of the property that would be infeasible or impracticable. Appx575. Indeed, Dr. Depew did not even acknowledge Charlotte County's statement in the Comprehensive Plan that "[t]he protection, preservation, and continuing viability of Category I wetlands shall be the prime objective of the basis for review of all proposed impacts." Appx575 (citing Appx1145) (ENV Policy 3.1.3).

Third, Dr. Depew's reliance on Southwest Florida Water Management District's 2012 Environmental Resource Permit, Appx369, Op. Br. 57, is unavailing. That Environmental Resource Permit did not include a dock. Appx152; Appx369. Indeed, the dock was excluded at the suggestion of the Water District to avoid a higher level of regulatory scrutiny. Appx150; Appx370, Appx195. Yet Plaintiff's own appraiser affirmed that boat access was a "very important" element of his valuation. Appx486. And more acres of mitigation were adopted in the Environmental Resource Permit than are proposed in the seven-unit development. *Compare* Appx1490 (original mitigation of 1.63 acres for Lemon Bay Environmental Resource Permit), *with* Appx492 (proposing 1.57 acres of mitigation in appraisal). Dr. Depew does not explain why this *reduction* in mitigation would be tolerated, given that the seven-unit development proposes the same amount of fill of wetlands, Appx375 and *additional* impacts to submerged lands, Appx370.

In sum, these facts refute Dr. Depew's breezy conclusion that a seven-unit development with dock would have been approved, and the CFC correctly credited Mr. Vincent's testimony instead. Appx26. Because "[s]peculative land uses are not considered as part of a takings inquiry," *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015) ("*Lost Tree IV*") (citing *Olson v. United States*,

292 U.S. 246, 257 (1934)), the CFC correctly concluded that the economic impact factor weighed in the government's favor.

III. Plaintiff's claim to bulkhead and fill cannot be segregated from the property to constitute a separate taking.

Lemon Bay contends that the Corps took a supposedly absolute and individualized entitlement to bulkhead and fill derived from a Florida state statutory provision that the Florida legislature repealed in 1957. Op. Br. 58-59. Lemon Bay is wrong. It cannot even convincingly assert that the bulkhead and fill rights survived their 1957 repeal. And whatever rights Lemon Bay has to bulkhead and fill cannot be segregated from other rights associated with the real property and subjected to individualized scrutiny under *Penn Central* or *Lucas*. Instead, Lemon Bay's supposed entitlement to bulkhead and fill is but one stick in the bundle of rights associated with ownership of the subject property, and those rights must be evaluated jointly in a legitimate takings analysis.

The CFC correctly rejected Lemon Bay's claim of a taking based only on the right to bulkhead and fill. Appx27. It is well settled that "'[t]aking' 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 Cent.*, 438 U.S. at 130. *See id.*, *cited in Concrete Pipe*, 508 U.S. at 644. The Supreme Court has "consistently rejected" the "circular" approach of "defining the property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra*, 535

U.S. at 331. The focus is instead "on the nature and extent of the interference with rights in the parcel as a whole." *Penn Cent.*, 438 U.S. 130-31. "Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel." *Forest Props*, 177 F.3d at 1365. Here, the submerged lands, wetlands, and uplands are not only combined in a single legal description, Lemon Bay's varied development plans treat them as a single economic unit. Thus, Lemon Bay's attempt to segregate one right from one portion of its property and demand a stand-alone takings analysis of that single right fails.

Trustees of the Internal Improvement Fund v. Claughton, 86 So. 2d 775, 789 (Fla. 1956)), does not support Lemon Bay's invocation of a "special riparian right" that is not subject to regulation. First, *Claughton*'s categorization of bulkhead and fill rights as "special riparian rights" *narrows* these rights by holding that "the Riparian Rights Acts of 1856 and 1921 were *not* applicable to and granted no rights to the grantees of sovereignty lands from the Trustees of the Internal Improvement Fund." 86 So. 2d at 789 (emphasis added). The court's reasoning in *Claughton* was that "none of such grantees are in any proper sense riparian owners at all; and riparian rights do not attach to such grants." *Id.* at 787.

Second, *Claughton* pre-dates the Florida legislature's 1957 repeal of Fla. Stat. § 253.15 (1955) and therefore does not address whether Lemon Bay's statutory right to bulkhead and fill is subject to the police power. The answer to

that question lies in *Zabel,* which held that the right to bulkhead and fill "is subject to reasonable regulation under the police power." 171 So.2d at 279. On the facts before it, *Zabel* concluded that "a denial of permission to fill *in this case* amounts to a taking of property without just compensation *because it was not established that the granting of the permit would materially and adversely affect the public interest." Id.* at 381 (emphasis added). Unlike here, the *Zabel* landowner's right to bulkhead and fill were the "only present rights attributable to ownership of the submerged land itself." 171 So.2d at 381. And unlike the documented adverse effects on public interest Lemon Bay's residential development poses, *Zabel* held that no "material[ly] adverse effect on the public interest had been demonstrated." 171 So. 2d at 379. It was, in fact, these same bases for distinguishing *Zabel* from this case that prompted the Florida Supreme Court to uphold the substantive basis of another development application denial. *See Graham v. Estuary Props., Inc.*, 399 So.2d 1374, 1378-79 (Fla. 1981).

Finally, as the CFC concluded, a restriction of the right to bulkhead and fill from a federal permit denial would not by itself demonstrate a taking. *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)). Lemon Bay cannot establish a taking of its real property, including whatever associated rights it has to bulkhead and fill submerged lands. Plaintiff's attempt to segregate an absolute bulkhead and fill right from the rest of the bundle of rights affiliated with the property and insisting a taking of that right is erroneous as a matter of fact and law.

CONCLUSION

For the foregoing reasons, this Court should affirm the CFC's judgment.

Respectfully submitted,

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I hereby certify that on April 3, 2023, I electronically filed the foregoing brief 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.

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