No. 22-2242

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEMON BAY COVE, LLC,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Original Proceeding from the United States Court of Federal Claims, No. 1:17-cv-00436-MCW
Honorable Mary Ellen Coster Williams, Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, Counsel for Amicus Curiae Pacific Legal Foundation certifies the following:

1. The full name of every party or amicus represented by us is:

Amicus Curiae Pacific Legal Foundation

2. The name of the real party in interest represented by me is:

Not applicable.

3. No parent corporations or publicly held companies own 10% or more of the stock of the party or amicus represented by me.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

David J. Deerson, Pacific Legal Foundation.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None.

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

None.

DATED: January 12, 2023.

s/ Christopher M. Kieser
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CONSENT OF PARTIES

Pursuant to Federal Rule of Appellate Procedure 29, Amicus states that all parties have consented to the filing of this amicus curiae brief.

STATEMENT OF INTEREST

Founded in 1973, Pacific Legal Foundation is a nonprofit public interest law foundation litigating in support of the right to use property free of intrusive government interference. PLF attorneys have served as lead counsel for property owners in several landmark property rights cases in the Supreme Court. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). After participating in this case as amicus in the Court of Federal Claims, PLF renews its participation specifically to address the impact of Transferable Density Units (TDUs) on Lemon Bay Cove's regulatory takings claims.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amicus curiae states that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made any

INTRODUCTION AND SUMMARY OF ARGUMENT

Commonly used by jurisdictions across America, the Transferable Density Unit—often known instead as a Transferable Development Right (TDR)—is a mechanism that aims to use the market to achieve a more optimal distribution of development rights. Arthur C. Nelson et al., The TDR Handbook: Designing and Implementing Transfer of Development Rights Programs xiv (2012). In Charlotte County particularly, the County explains that its TDU program "shifts residential density from areas where it is inappropriate . . . to areas where [it is] more appropriate." Transfer of Density Units (TDU), Charlotte County, Florida, Government Portal.[2] It does so by identifying "sending zones, areas where density is removed, and receiving zones, areas where density is added." *Id.* Property owners in "sending zones" who have unused "density units"—increments of permitted housing—can "sever" them from their own lots and ultimately sell them as "density credits" to

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monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made any monetary contribution to the brief's preparation or submission.

[2] https://www.charlottecountyfl.gov/departments/community-development/planning-zoning/comprehensive-planning/transfer-of-density-units.stml (last visited Jan. 10, 2023).

property owners in "receiving zones." Charlotte Cnty. Muni. Code § 3-9-150(b). The receiving owners could then develop in excess of the otherwise applicable density limits.

While a TDU or a TDR may have some value depending on the demand for extra units from those in the receiving zones,[3] it is no substitute for the right to build on one's own property. *See Suitum*, 520 U.S. at 747 (Scalia, J., concurring in part and concurring in the judgment) ("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."). It is not a property right itself. Instead, the TDU constitutes "a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking." *Id.* It follows that the availability of TDUs should not factor into the Court's regulatory takings analysis,

[3] The value of a TDU is "inherently speculative." *See* Trevor D. Vincent, *Exploiting Ambiguity in the Supreme Court: Cutting Through the Fifth Amendment With Transferable Development Rights*, 58 Wm. & Mary L. Rev. 285, 299 (2016) (quoting William Hadley Littlewood, Comment, *Transferable Development Rights, TRPA, and Takings: The Role of TDRs in the Constitutional Takings Analysis*, 30 McGeorge L. Rev. 201, 229 (1998)). Such transferable rights may be worth nothing at all "if no developers in the designated receiving area are interested in or willing to buy those rights." *Id.*; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 732 (1997) (noting the property owner's argument that no market existed for TDRs in the Lake Tahoe region).

whether under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) or *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

ARGUMENT

I. Availability of TDUs Cannot Preclude a *Lucas* Taking

A regulatory taking occurs when government regulation of a property owner's right to put his property to productive use "goes too far." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Lucas*, the Supreme Court recognized that a regulation always goes too far when it "denies all economically beneficial or productive use of land." 505 U.S. at 1015. Lemon Bay persuasively argues that the Corps of Engineers denial of its permit with prejudice has met this criteria—after all, without a permit from the Corps, no development of the property is permitted. But the Government argued below that the availability of TDUs should preclude a *Lucas* taking because the property retains residual value despite being undevelopable. Such a rule would conflict not only with *Lucas*, but with leading precedent of this Court.

That *Lucas* turned on the deprivation of all property *use*, rather than *value*, is evident throughout the Court's opinion. The majority

repeatedly—no less than nine times—expressed its rule in terms of use. To justify its categorical rule, the Court noted that the "usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,'" is misplaced in "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." *Id.* at 1017 (quoting *Penn Central*, 438 U.S. at 124); *see also id.* at 1018 ("regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm"). And it emphasized the Court's historic "abiding concern for the productive use of, and economic investment in, land." *Id.* at 1020 n.8. Nowhere did the Court suggest that residual value not connected to any beneficial *use* of the land could defeat a taking.

Confusion on this score likely stems from two sources. First, *Lucas* ultimately reviewed a ruling of a South Carolina trial court that found the applicable regulation had rendered the property in that case "valueless." *Id.* at 1007. But, as others pointed out, this was a "curious finding." *Id.* at 1034 (Kennedy, J., concurring in the judgment). After all,

it is difficult to imagine that any lot—much less a beachfront lot like the one at issue in *Lucas*—loses *all* of its value when it is declared undevelopable. Even a total restriction on development likely leaves a property owner with some value—he "still can enjoy other attributes of ownership, such as the right to exclude others," "can picnic, swim, camp in a tent, or live on the property in a movable trailer[,]" and "retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house." *Id.* at 1044 (Blackmun, J., dissenting); *see also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (Fed. Cir. 1986) (recognizing that regulated land will retain value because buyers might "bet that the prohibition . . . would some day be lifted."). To be sure, some of these suggestions are not uses of the property at all, while others may not be productive or economically beneficial uses, but an empty lot that can't be developed almost certainly has some residual value. The *Lucas* majority thus correctly focused on "economically beneficial or productive use of land," *id.* at 1017 (majority opinion), rather than value as the measure of whether a use restriction categorically "goes too far" so as to effect a taking. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95

F.3d 1422, 1433 (9th Cir. 1996), *aff'd* 526 U.S. 687 (1999) ("Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value.").

The second source of confusion is the Supreme Court's later decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). There, the Court in passing referred to the *Lucas* rule as applicable where "a regulation permanently deprives property of all value." *Id.* at 332. But that dicta could not have modified *Lucas*' focus on property use. After all, in *Tahoe-Sierra*, the Court dealt with a 32-month development "moratorium" which the district court had found deprived the property owners of all economically viable use *for those 32 months*, although the "property did retain some value during the moratoria." *Id.* at 316. And of course it did—the property owners subject to the moratorium could have sold the properties, and the buyers would have had a reasonable expectation of development after the moratorium expired. The property owners in *Tahoe-Sierra* didn't lose because their properties retained value—rather, they lost because the Supreme Court interpreted *Lucas*'s categorical rule to apply only to a permanent restriction on property use, so a 32-month moratorium was not enough.

See id. at 331–32. Like *Lucas* itself, *Tahoe-Sierra* does not support a value-based rule.

Indeed, this Court recognized as much not long ago. Like Lemon Bay, the property owner in *Lost Tree Village Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015), saw its permit application denied by the Corps of Engineers. The denial forced Lost Tree to leave its parcel vacant, reducing its value from $4 million to $30,000. *Id.* at 1114. The government nevertheless argued that the permit denial did not effect a *Lucas* taking because Lost Tree could still sell the property for its residual value. *Id.* at 1117. This Court disagreed. Instead, it recognized that "[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Id.* Consequently, if a parcel's residual value derives solely from noneconomic uses—the mere existence of a potential buyer for the property will not preclude a *Lucas* taking. *See also Del Monte Dunes*, 95 F.3d at 1433 ("[T]he mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim.").

That same principle applies to TDUs. Even assuming Charlotte County's TDUs have any non-speculative value at all, a TDU is not a *use* of Lemon Bay's property at all. Instead, it is the opposite of a use. Were it to participate in the TDU program, Lemon Bay would have to enter a perpetual restrictive covenant that encumbers its own property. Charlotte Cnty. Muni. Code §§ 3-9-150(b), (f). Such a covenant would make it more difficult for Lemon Bay to use its property even in the event that it became possible to obtain a Corps permit at some point in the future. And as for the TDU itself, it is best understood as a token that would allow someone else to develop *another property* somewhere else in the county. *See Suitum*, 520 U.S. at 747 (Scalia, J., concurring in part and concurring in the judgment) (a transfer of development right has "nothing to do with the use or development of the land to which they are (by regulatory decree) 'attached'"). Like the residual value in *Lost Tree*, the sale value of a TDU does not derive from any economic use of Lemon Bay's property. Any value it might have derives solely from another owner's ability to use another hypothetical parcel in the receiving zone in Charlotte County. Therefore, the value of the TDUs is irrelevant to the *Lucas* inquiry. *Lost Tree*, 787 F.3d at 1117.

A *Lucas* taking generally occurs where government regulation requires "land to be left substantially in its natural state." *Lucas*, 505 U.S. at 1018. Such an arrangement carries "a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* Lemon Bay has ably demonstrated that the Corps' permit denial has forced it to leave its land economically idle for the public good.[4] The existence of Charlotte County's TDU regime does not preclude Lemon Bay's *Lucas* claims.

[4] The Court of Federal Claims found that Lemon Bay "did not prove that the Corps' denial of its permit for a 12-unit project deprived the property of all economic value as required to establish a categorical taking." 160 Fed. Cl. 593, 610 (2022). But it cannot be true that the law requires Lemon Bay to repeatedly apply for permits for smaller and smaller proposed developments in order to prove that the Corps would *never* permit an economically viable use. As the Claims Court wisely recognized three decades ago, "[c]ommon sense" precludes requiring a property owner to "prove a negative," such that no permit would ever be granted. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 157 (1990). As Lemon Bay persuasively argues here, it need not satisfy that impossible burden to demonstrate a *Lucas* taking.

II. Any Potential Value TDUs Might Have Is Not Material to Lemon Bay's *Penn Central* Claim

The *Penn Central* ad hoc analysis—applicable to restrictions on the use of property that do *not* result in the deprivation of all economically beneficial use—focuses on three factors: (1) the economic impact of the regulation; (2) the property owner's reasonable investment-backed expectations; and (3) the character of the government action. *Penn Central*, 438 U.S. at 124. *Penn Central* itself involved the landmark designation of Grand Central Station in New York City, which effectively precluded the property owner's use of the airspace above the station for development. *See id.* at 116–18. In evaluating the economic impact of the development restriction, the Supreme Court noted that Penn Central's "ability to use" the air rights had "not been abrogated" but instead "made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings." *Id.* at 137. While the Court acknowledged the possibility that New York City's TDR program was "far from ideal," it relied on a state court holding that the rights were "valuable" and held that they "undoubtedly mitigate whatever financial burdens the law has imposed

on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Id.*

This dicta in *Penn Central* is easily distinguishable. As Justice Scalia explained, the analysis in *Penn Central* was "applied to landowners who owned at least eight nearby parcels, some immediately adjacent to the terminal, that could be benefited by the TDRs." *Suitum*, 520 U.S. at 749. But unlike Penn Central, Lemon Bay cannot make use of its own property through Charlotte County's TDU program. Even assuming the county's TDUs are marketable, they simply allow *someone else* to develop property elsewhere. Put simply, "*Penn Central*'s one-paragraph expedition into the realm of TDRs" should not control a case with decidedly different facts. *Id.*

Cases such as *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Claims 1981), and *Good v. United States*, 39 Fed. Cl. 81, 108 (1997), *aff'd* 189 F.3d 1355 (Fed. Cir. 1999), fail to address this key distinction. *Deltona* discusses TDRs in an add-on footnote simply noting the *Penn Central* dicta, while *Good* did not consider Justice Scalia's argument in *Suitum* that *Penn Central* had been different because the property owner itself could develop its own land due to TDRs. But more to the point, the

Supreme Court has more recently made clear—citing Justice Scalia's *Suitum* concurrence—that "any payment from the Government in connection with [a taking] goes, at most, to the question of just compensation." *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015).

And so it must be. TDUs are not property rights. After all, "[t]he 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." *Suitum*, 520 U.S. at 747. The TDU—the ability to sell to someone else a right to develop someone else's parcel—is "a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking." *Id.* And were the Government able to avoid takings liability simply by providing valuable credits for someone else to build on another parcel, it could easily "get away with paying much less" in order to impose a stringent use restriction on private property. *See id.* at 748.

Yet even assuming the *Penn Central* dicta applies here, it remains true that the economic impact of the permit denial must be considered apart from any speculative benefits that Lemon Bay might realize were it to sell TDUs. As this Court has explained, "[t]he plaintiff must establish economic impact, but it need not establish the absence of any

mitigating factors. Offsetting benefits, if there are any, must be established by the government to rebut the plaintiff's economic impact case." *CCA Assocs. v. United States*, 667 F.3d 1239, 1245 (Fed. Cir. 2011). The Government failed to prove that below—the Court of Federal Claims said instead that "the opinion and testimony of [the Government's] expert on the estimated valuation of the potential perfection and sale of Plaintiff's TDUs" was "unpersuasive," such that the record was "insufficient . . . to resolve" the question "whether the potential perfection and sale of Plaintiff's estimated TDUs had economic value, and, if so, what that value was." *Lemon Bay*, 160 Fed. Cl. at 612 & n.16. Even if the value of TDUs could in theory be relevant to the *Penn Central* inquiry, such speculative "offsetting benefits" should not be. *See CCA*, 667 F.3d at 1245–46 (refusing to consider offsetting benefits considered "too speculative to mitigate [the property owner's] proof of economic harm").

In short, just as the value of Lemon Bay's TDUs has no place in the *Lucas* analysis, it is similarly irrelevant to the success of Lemon Bay's *Penn Central* claim. For the reasons ably stated in Lemon Bay's briefing, the Court should hold that the Corps' permit denial effected a taking under *Penn Central*.

CONCLUSION

For the reasons stated herein and in Lemon Bay's briefing, Amicus Pacific Legal Foundation respectfully requests that the Court reverse the judgment below.

DATED: January 12, 2023.

Respectfully submitted,

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CHRISTOPHER M. KIESER