No. 15-1192

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

LOST TREE VILLAGE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND OVERVIEW

This case presents a fact-specific takings claim that is unique to the circumstances of the land involved and, as a result, the Federal Circuit's decisions are sui generis. In the first decision, the court recognized that a property parcel owned by respondent Lost Tree Village Corporation ("Lost Tree"), known as "Plat 57," was the only relevant property to consider in assessing Lost Tree's takings claim because it is legally and factually distinct from any other property Lost Tree owns. Petitioner's Appendix ("Pet.App.")[1] 15a. In the second decision, the court held that when the U.S. Army Corps of Engineers denied Lost Tree's application for a permit necessary to develop Plat 57 into a single family home site, that denial was a categorical taking of the parcel under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Pet.App.1a.

The Government's request for further review of the Federal Circuit's two separate decisions rests entirely on fact-based arguments presented too late in the very long life of this case. Lost Tree and the Government entered into 163 stipulations of fact (plus twenty-six stipulated exhibits), Opp.App. 1a, and after a seven-day trial, the Court of Federal Claims made extensive additional factual findings. Pet.App. 61a-94a. Those are the controlling facts that underlie the Federal Circuit's rulings, and those facts differ – in some significant ways – from the recitation in the Government's petition. For example, although

1. The appendices attached to the Petition for a Writ of Certiorari are cited as "Pet.App. __a." The appendices attached to this Brief in Opposition are cited as "Opp.App. __a."

the petition asserts five different times that Plat 57 is "contiguous" with another parcel Lost Tree owns called "Plat 55," *see* Petition ("Pet.") at (I), 3, 8, 17, the parties *stipulated* that Plat 55 is "323 feet away" from Plat 57. Opp.App. 31a.

The Federal Circuit ruling on the relevant parcel issue also rested on other specific and unique facts demonstrating that Plat 57 is not only a separate property parcel under local law, but is distinct from the surrounding property in the John's Island community for numerous additional reasons. First, it is one of only a handful of scattered parcels that Lost Tree still owns in the community, each distant from Plat 57. The rest of Lost Tree's property was developed and sold as home sites decades ago. Pet.App. 16a-20a. After completing John's Island in 1995, Lost Tree exited the development business entirely. Pet.App. 27a, 73a-78a. In 2001, having "ignored" Plat 57 until then, Pet.App. 20a, Lost Tree decided to develop it for reasons having nothing to do with its prior development of the community. Pet.App. 87a-89a. For these and other reasons rooted in the rich factual record, the Federal Circuit properly held that Plat 57 is disconnected from the surrounding community and should be considered alone in the takings analysis.

Despite its stipulations and the factual findings of the trial court, the Government now attempts to manufacture an issue by repeatedly asserting that Lost Tree either "disavowed" any intent or expectation to develop Plat 57, Pet. at 21, or somehow schemed to "isolate" Plat 57 by leaving its development to the end, Pet. at 16. The record is to the contrary. Lost Tree contended, and the trial court found as a fact, that Lost Tree "developed

investment-backed expectations specifically for Plat 57" when it sought to develop the parcel in 2001. Pet.App. 56a; *see* Pet.App. 128a (Lost Tree had "objectively reasonable" expectations for Plat 57). The Federal Circuit's relevant parcel ruling rested on facts showing that Lost Tree's development expectations for Plat 57 were *distinct* from its historical development of the rest of the community, not that Lost Tree had no expectations for Plat 57. Pet. App. 26a-29a. Similarly, the trial court's factual findings showing that Plat 57 was "ignored entirely" until 2001, Pet.App. 111a, a fact the Federal Circuit also relied on, Pet.App. 20a, belies the Government's theory that Lost Tree acted intentionally over many decades to make Plat 57 the relevant takings parcel.

Nor does the Government allege, or could it, that a different rule should apply to these unique facts. The Government proposes no specific relevant parcel other than Plat 57. It also never criticizes (and barely mentions) the legal rule the Federal Circuit applied in holding Plat 57 alone to be the relevant takings parcel. The Government merely suggests that other courts have identified a number of factors bearing on the relevant parcel question, Pet. at 15-16, without taking a position on what factor(s) – other than those that drove the decision below – should be considered important in this case. Ultimately, it is the particular and largely idiosyncratic facts supporting the relevant parcel determination in this case that the Government does not like – as well as the result. Those are not reasons for further review.

Further review is also unnecessary to address the second question posed in the petition, which is whether the Federal Circuit erred in "failing to consider the absence of

reasonable, investment-backed expectations," *see* Pet. at (I), when it found the government liable for a taking under *Lucas*. That question is not actually presented in this case, because there is no "absence" of such expectations here. The trial court found factually that Lost Tree had reasonable investment-backed expectations for Plat 57. Pet.App. 56a, 128a. For that same reason, even if such expectations were relevant to a *Lucas* taking, the result in this case would be the same.[2] Nonetheless, the Federal Circuit correctly recognized that investment-backed expectations are not relevant to a *Lucas* taking like that involved here. *See* pp. 17-20, *infra.*

Finally, the Court also should reject the Government's request that the Court hold the petition pending its decision in *Murr v. Wisconsin*, No. 15-214. As the petition acknowledges, that case presents "the parcel-as-a-whole inquiry in a quite different context." Pet. at 29. *Murr* involves two contiguous real property parcels under common ownership. The lower court applied, and the question presented asks this Court to review, what amounts to a *per se* rule that distinct but contiguous parcels under common ownership must be considered together – as one relevant property – in assessing a regulatory takings claim. *See* Brief of Petitioner at i, *Murr v. Wisconsin,* No. 15-214 (Apr. 11, 2016). Because in this case Plat 57 is not contiguous with any other parcel owned

2. That is particularly so because, as the trial court also found, the permit denial at Plat 57 also constitutes a taking under the alternative analysis required by *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Pet.App. at 54a-58a. That analysis takes account of investment-backed expectations, as the trial court did (and doubtless would do again) in applying *Penn Central*. Pet.App. at 56a-57a.

by Lost Tree, the result here will not change whether the Court approves or disapproves the rule under review in *Murr*.

This case is already more than eight years old. There is no reason in *Murr*, or in the petition generally, to further delay its conclusion.

The petition should be denied.

ARGUMENT

I. The Federal Circuit's Relevant Parcel Ruling Is Case-Specific and Consistent with this Court's Precedent.

The Government's fact-based criticisms of the Federal Circuit's relevant parcel ruling not only reflect the case-specific nature of the ruling, but show that the petition is grounded mostly on the Government's disagreement with the lower court's conclusion rather than any conflict with a decision of this Court, or any other court. In essence, the Government simply contends the Federal Circuit's ruling was "erroneous." *See* Pet. at 13. But the government's criticisms overlook and misstate key facts – unique to this case – that the Federal Circuit relied on to conclude that Plat 57 should be viewed alone in the takings analysis.

A. The Government's recitation of the chronology of Lost Tree's development of the John's Island community fails to mention that, upon completing the community in the mid-1990s, *see* Pet. at 3-5, Lost Tree exited the development business completely and hired a new President (Mr. Bayer) to redirect the company's

business to commercial property management. *See* Pet. App. 73a-78a (noting Lost Tree's change of its Standard Industrial Classification ("SIC") on its federal tax return away from real estate development and its adoption of a tax accounting method not permissible for developers); Pet. App. 74a (quoting Bayer testimony that "he was brought on to take the company in a new direction.").

Nor does the Government mention the circumstances that, seven years later, first led Lost Tree to consider developing Plat 57. In 2001, Lost Tree became aware it could obtain certain wetlands mitigation credits as a result of work performed by a nearby landowner on an island outside the John's Island community, half of which Lost Tree owned. Pet.App. 87a-89a. Lost Tree initially considered creating a mitigation bank to enable future use of the credits, but was encouraged by a Florida state agency to identify a current, site-specific project for the credits. Pet.App. 88a-89a. Mr. Bayer and a Lost Tree consultant (Mr. Melciori) then scoured the John's Island community searching for some parcel that could potentially be developed to make use of the credits. They happened upon Plat 57 as the only property that Lost Tree still owned that "'was even remotely possible [to be developed] within John's Island.'" Pet.App. 89a. Though omitted from the petition, these peculiar facts establish that Lost Tree's attempt to develop Plat 57 was unrelated to its historical development of the John's Island community.

The Government also fails to mention the legal entitlements Lost Tree obtained specifically for Plat 57. In October 2002, the Town of Indian River Shores granted Lost Tree's request for approval of a preliminary plat for

Plat 57, and for conditional use authority and a marginal wetlands determination under local law, which allowed for a residential home on the parcel (collectively, the "Town Approvals"). Pet.App. 90a. The Town Approvals were challenged in litigation by third parties, in which Lost Tree intervened, but after a three-day bench trial a Florida court upheld the Town Approvals as consistent with the Town's Comprehensive Plan. It also found the Town's determination that the wetlands at Plat 57 were "marginal" was supported by substantial evidence. Pet. App. 90a-91a n.23a; *see* Opp.App. 36a-37a, 54a (Florida court opinion). In November 2002, Lost Tree obtained a state-law wetlands fill permit from the St. John's River Water Management District. Opp.App. 36a. The parties also stipulated that Lost Tree obtained "all other local approvals needed and all necessary approvals from the State to develop Plat 57 into a home site," and that Plat 57 is taxed as a separate parcel. Opp.App. 37a, 37a-38a. There can be no question, therefore, that under State and local law, Plat 57 is a distinct property parcel and Lost Tree has the legal right to develop the parcel into a home site.[3]

B. In addition to these significant factual oversights, the three principal grounds on which the Government criticizes the Federal Circuit's relevant parcel ruling misstate the facts relied on by that court and found by the trial court. The Government also does not criticize any legal rule the Federal Circuit applied in focusing on

3. The Government's claim that Plat 57 "has never been formally platted," Pet. at 2-3, is misleading at best. Under local law, the approved preliminary plat defines the property parcel, and a final plat cannot be filed until development work is completed, which the Corps' permit denial precluded. *See* Opp.App. 71a-75a, 99a (copy of preliminary plat for Plat 57).

Plat 57 alone. Ultimately, albeit implicitly, the Government largely agrees with the Federal Circuit's legal approach to the relevant parcel issue. *See* pp. 14-15, *infra.*

1a. Expectations – Facts. The Government initially asserts: "First, the court rested on respondent's *lack* of development expectations for Plat 57 in determining that it alone was the relevant parcel." Pet. at 13 (emphasis in original). That is not correct. The crux of the Federal Circuit's ruling is not that Lost Tree lacked development expectations for Plat 57, but that those expectations were *distinct* from Lost Tree's historical plans and conduct in developing the John's Island community. As the Federal Circuit explained:

> Lost Tree did not treat Plat 57 as part of the same economic unit as other land it developed into the John's Island community. . . . The objective evidence of Lost Tree's actions demonstrates that the company considered the John's Island community completed long before it proposed to fill wetlands on Plat 57. . . . In short, this court sees no error in the trial court's factual findings that 'Lost Tree's belated decision to develop Plat 57 was not part of its planned actual or projected use of the property constituting the John's Island community.'

Pet.App. 26a-28a; *see* Pet.App. 29a ("Lost Tree had distinct economic expectations for . . . Plat 57.").

Eventually the Government acknowledges that the Federal Circuit based its relevant parcel ruling on Lost Tree's "distinct" expectations for Plat 57, not on its absence

of expectations. Pet. at 18. The Government then shifts ground to claim that Lost Tree's expectations were not reasonable or investment-backed. Pet. at 20-21, 22. That too misstates the facts. The trial court found factually that Lost Tree's expectations regarding development of Plat 57 in 2002 were "objectively reasonable." Pet.App. at 128a; *see also* Pet.App. 56a ("Lost Tree had developed investment-backed expectations specifically for Plat 57."). That conclusion was based on facts stipulated by the parties or found by the trial court, including: (i) over the years Lost Tree had obtained from the Corps several Section 404 permits at the John's Island community, *see* Opp.App. 19a, 23a; (ii) another company having common ownership and management with Lost Tree obtained a wetlands fill permit from the Corps for a parcel in John's Island in 2002, just before Lost Tree began attempting to develop Plat 57, Opp.App. at 30a; *see* Pet.App. 82a-83a & n.15; (iii) Lost Tree obtained the Town Approvals and all other necessary approvals to develop Plat 57, including the state wetlands fill permit, Pet.App. 90a; and (iv) Lost Tree was aware of at least one other wetlands fill permit issued by the Corps during the same time period (around 2000) for a single lot in John's Island; Opp.App. at 91a-93a. Given that record, the Federal Circuit readily agreed that "[t]he trial court's findings support the conclusion that Lost Tree had distinct economic expectations for . . . Plat 57." Pet.App. at 29a.[4]

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4. The record also demonstrates that Lost Tree invested amply in its attempt to develop Plat 57, beginning in 2002, by hiring an environmental consultant and a botanist, obtaining the Town Approvals and defending them in litigation, obtaining the state wetlands permit, and performing other pre-development work. *See* Opp.App. 35a-37a. The Government asserts, without explanation (or authority), that such expenses are not "investment of the sort

The Government asserts – three times – that Lost Tree "represented" and gave the Corps "assurance," Pet. at 6, 22, that it would not develop other wetlands in John's Island, as evidence that Lost Tree's expectations for Plat 57 were not reasonable. *See* Pet. at 22 ("especially unreasonable given . . . [that] assurance"). That accusation is another misstatement. At trial, Lost Tree's consultant Mr. Melchiori denied giving any such assurance. Opp.App. 87a-88a. Even the testimony of the Government's witness with whom he spoke acknowledged that Mr. Melchiori excepted from his statement "parcels" – like Plat 57 – "that were inaccessible, or that they had not surveyed to see if there were developable uplands." Opp.App. 94a-95a. The Corps' decision document denying the Section 404 permit for Plat 57 notes that same "exception." Pet.App. 176a. In any event, on all the evidence the trial court found Lost Tree's expectations regarding development of Plat 57 to be "investment-backed" and "objectively reasonable," Pet.App. 56a, 128a, and the Federal Circuit affirmed that conclusion, Pet.App. 29a.

1b. Expectations – Law. Although the Government makes fact-based arguments regarding Lost Tree's expectations for Plat 57, it does not criticize – and barely mentions – the legal rule the Federal Circuit applied in finding that Lost Tree's distinct "economic expectations" were important to its relevant parcel determination. *See* Pet.App. 25a-26a (discussing the legal rule). Presumably that is because in the case that led to the legal rule the Federal Circuit applied in this case, that same legal rule was applied in a manner favorable to the Government.

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that could create distinct investment-backed expectations." Pet. at 22. Of course they are, as the trial court found. Pet.App. 56a.

See Forest Properties, Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999). The Government has no reason to criticize the legal rule; it only objects to application of the rule to the particular facts of this case.

2a. Plat 57 Is Distinct – Facts. The Government next contends broadly, without reference to Lost Tree's expectations, that the Federal Circuit "clearly erred" in concluding that Plat 57 "should be isolated from all other property interests in the John's Island community that respondent once owned – or even still owned." Pet. at 16. The basis for this criticism appears to be that Plat 57 had so many different connections to the overall community of John's Island that its "isolation" was error. *See* Pet. at 16-19 (noting various factors purportedly linking Plat 57 to other property in the community). Here again, the Government's arguments contradict the parties' stipulations and the trial court's factual findings, which detail extensively how and why Plat 57 is a distinct property parcel not connected to Lost Tree's development of the community years previously. *See, e.g.,* Pet.App. 64a-90a (trial court findings of fact); Opp.App. 25a-27a, 31a-33a, 37a.

The Government acknowledges that Lost Tree "had sold much of the property it owned in the community by the time it sought [the] permit to fill Plat 57" in 2004. Pet. at 17. In fact, Lost Tree had sold every other parcel of developable property within the community more than nine years previously – prior to 1995 – and sold most of that other property in the 1970s and 1980s. Pet.App. 67a-73a. This is important because there is no support, in precedent or in basic takings principles, for the notion that property that Lost Tree does not own should be included in the relevant takings parcel. This Court has explained

the relevant parcel inquiry as follows: "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that *remains* in property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 497 (1987) (emphasis added) (citation omitted). In answering this critical question, it makes no sense to speak of value "remaining" in property the claimant does not own. For that reason, the Government appropriately does not claim the relevant takings parcel should include "Plat 40," a parcel that shares a boundary with Plat 57 but that Lost Tree sold to a third party long ago. *See* Opp. App. 31a-32a; *see also* Pet.App. 17a (map showing Plat 57's shared boundary with Plat 40).

Consistent with Lost Tree's prior sale of virtually all its property in the John's Island community, the petition no longer advocates the relevant parcel position the Government took throughout the litigation in the lower courts, which was that the entire community – now owned mostly by strangers – is the relevant property to consider for takings purposes. *See, e.g.,* Pet.App. 105a (noting Government position). The Government now, in the petition, notably does not advocate *any* particular property as the relevant takings parcel. Ultimately, however, the Government does retreat to the position that, "at the very least," Plat 57 should be combined with Plat 55, because, the Government states, those parcels are "contiguous" and Lost Tree "retain[s] significant development prospects for them." Pet. at 17-18. Once again, those statements are contrary to the record facts, which led the Federal Circuit to properly exclude Plat 55 from the takings analysis. Pet.App. 28a-29a.

Plat 57 and Plat 55 are 323 feet apart. That is not "contiguous," which means "[s]haring an edge or boundary; touching." *See* THE AMERICAN HERITAGE DICTIONARY (5th ed. 2015), https://www.ahdictionary.com. The Federal Circuit recognized that the physical separation of the two parcels consists of a "narrow, 323 foot long shoulder along the north side of the road." Pet.App. 19a-20a; *see* Opp.App. 31a. The trial court found factually that Lost Tree does not own that narrow road shoulder, but only "water and marsh [beyond] the shoulder." Pet.App. 82a & n.14; *see* Opp.App. 96a-97a (Melchiori testimony: no "usable land."). Thus, a road shoulder longer than a football field, not owned by Lost Tree, lies between Plat 57 and Plat 55. On those facts, the Federal Circuit properly excluded Plat 55 from the takings parcel, citing *Lucas* and explaining that "the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis." Pet.App. 28a-29a (citing *Lucas*, 505 U.S. at 1017 n.7). This Court was more definitive in the *Lucas* footnote, criticizing as "extreme" and "unsupportable" the New York Court of Appeals' decision in that case to examine the impact of a regulation on a "particular parcel . . . in light of [the] total value of the takings claimant's other holdings in the vicinity.").

Nor can Plat 57 and Plat 55 be aggregated on the ground that they both "retain significant development prospects," as the Government states, because that characterization is also contrary to the trial court's factual findings, as the Federal Circuit recognized. Pet. App. 28a. ("Unlike Plat 57, Lost Tree treated Plat 55 as part of the John's Island community, developing it for eventual sale as three single family home sites at the

same time it developed Plat 40 on Stingaree Point"); *see* Pet.App. 81a-82a (Plat 55 "had been developed and the infrastructure for it laid in 1985 when Stingaree Point was developed.").

On the facts of this case, as stipulated and found by the trial court, it would have been error to identify a relevant takings parcel *other than* Plat 57. Instead, "after a careful review of the entire record," the Federal Circuit correctly "determine[d] that the relevant parcel is Plat 57 alone."[5]

2b. Plat 57 Is Distinct – Law. At bottom, the Government contends that, in assessing Plat 57's connection to surrounding land in John's Island, the Federal Circuit should have considered a variety of factors bearing on the relevant parcel inquiry. Pet. at 15-16. That is exactly what the court did when it applied the "flexible approach" it also has applied in other cases, an approach "designed to account for factual nuances." Pet.App. 25a. As the Government acknowledges, the

5. The Government doctors a quote from *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), to contend that the "natural starting point – and, quite often, the end point – for the relevant-parcel determination is 'the metes and bounds' . . *of contiguous acres* held under common ownership." Pet. at 16 (quoting 535 U.S. at 331; emphasis added). In this case Lost Tree does not own any "contiguous acres," but *Tahoe-Sierra* also did not involve any question about contiguous land; it involved a temporal building moratorium. *See id.* at 306. What the Court actually said in *Tahoe-Sierra* is that "[a]n interest in real property is defined by the metes and bounds that describe *its* geographic dimensions." *Id.* at 331 (emphasis added). As applied here, that supports the Federal Circuit's conclusion that the geographic metes and bounds of Plat 57 constitute the relevant takings parcel. *See* Opp.App. 99a (preliminary plat for Plat 57).

trial court recognized a range of potentially relevant factors. Pet. at 15. Then, based on that court's factual findings, both courts below determined that under the "flexible approach," they needed to focus on the particular facts of importance in this case: the physical, legal and temporal separation between Plat 57 and the surrounding property, as well as the many facts showing that Lost Tree's economic expectations for Plat 57 had nothing to do with its long-previous development of the John's Island community. The Government offers no persuasive reason why that fact-driven analysis was inappropriate, even under the "consider all appropriate factors" approach it suggests in the petition.

3a. Plat 57 Was "Ignored" – Facts. The Government suggests the Federal Circuit's relevant parcel ruling is flawed because it rewards Lost Tree – and purportedly would reward developers generally – for deliberately deferring development of wetlands because of the need for a permit and their relative unsuitability for development. *See* Pet. at 13, 19, 19-20. This criticism again contradicts the trial court's detailed factual findings showing that neither of those factors affected Lost Tree's treatment of Plat 57 – and instead, Lost Tree simply "ignored" Plat 57. Pet.Opp. 72a-73a, 87a-89a. The Federal Circuit relied on those findings and affirmed that conclusion. Pet.App. 20a.

The record also establishes, contrary to this Government criticism, that Lost Tree affirmatively incorporated numerous other wetland tracts into John's Island in the course of developing the community over many decades. Pet.App. 71a-72a (Noting "various parcels reserved as conservation easements by deed restrictions recorded by Lost Tree."); *see* Opp.App. 75a-85a (at 77a:

testimony that "Tracts C, D, E, G, H, I, J, K, L, they all contain wetlands."); Pet.App. 9a-10a; *see also* Opp.App. 85a-87a (testimony about wetlands subject to conservation easements). The Government does not, and cannot, cite any record support for its theory about how developers treat wetlands generally, or its speculation about how Lost Tree "surely" treated Plat 57 in particular. *See* Pet. at 19. Until the fortuitous discovery of the mitigation credits in 2001, *see* Pet.App. 87a-89a, Plat 57 was, as the trial court found, simply "ignored." *See* Pet.App. 27a ("Lost Tree's failure to plan for Plat 57 even as open space supports the trial court's conclusion that the parcel was 'ignored' – rather than intentionally left undeveloped."). And while at least some wetlands may well "enhance the value of the surrounding uplands," Pet. at 17, the Government's claim that "[w]etlands like Plat 57" do so also contradicts the record: the parties stipulated that Plat 57 "contains a mangrove *swamp*." Opp.App. 32a; *see* Pet.App. 54a n.9 (noting "stagnant eutrophic pools" at Plat 57).

3b. Plat 57 Was "Ignored" – Law. The Government tries to turn its misstatements about how Lost Tree treated Plat 57, in contrast to other wetlands, into a legal point, suggesting that the Federal Circuit decision somehow "conflicts" with this Court's instruction that the relevant takings parcel should not be defined by reference to the regulation being challenged. Pet. at 19. *See, e.g., Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust,* 508 U.S. 602, 643-44 (1993) ("[A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."). But Lost Tree has never claimed, and the Federal Circuit did not find, that Plat

57 alone is the relevant takings parcel because it contains regulated wetlands requiring a Section 404 permit. State property law defines and protects (and taxes, *see* Opp. App. 37a-38a) Plat 57 as a distinct property parcel, and the Town Approvals underscore Lost Tree's development rights in that separate parcel. Moreover, as a result of Lost Tree's prior development and sale of virtually all other property throughout the John's Island community, Plat 57 remains today as an isolated parcel of developable property and the *only* such parcel that Lost Tree owns in the community. *See* Pet.App. 114a-115a. These and the other unique facts the trial court found and the Federal Circuit relied on "define" Plat 57 as the relevant takings parcel, not its regulated status.

There is no reason for further review of that conclusion here.

II. The Federal Circuit Correctly Applied *Lucas*, Because the Government's Denial of All Economic Use of Plat 57 Is a Categorical or "*Per Se*" Taking.

The second question presented in the petition is "[w]hether the court of appeals erred in holding that the *absence* of reasonable, investment-backed expectations could not be considered in determining whether the denial of the permit [for Plat 57] resulted in a categorical regulatory taking" under *Lucas*. Pet. at (I) (emphasis added). That question is not actually presented in this case, because the record and the trial court's factual findings contradict the question's premise that Lost Tree had an "absence" of investment-backed expectations for Plat 57. *See, e.g.,* Pet.App. 56a, 128a. Still, the Federal Circuit properly affirmed the trial court's conclusion

that a *Lucas* taking occurred without considering that court's finding that Lost Tree had "objectively reasonable" development expectations for Plat 57. Pet.App. 128a.

The Government does not dispute that denial of the Section 404 permit eliminated all economic use of Plat 57. *See* Pet.App. 7a-13a (no remaining economic use for Plat 57). As the Federal Circuit recognized, that fact alone makes out a "categorical" or "*per se*" taking under *Lucas*. Pet.App. 6a-7a; *see Lucas*, 505 U.S. at 1015 ("the second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."); *Lingle v. Chevron, U.S.A., Inc. v. United States*, 544 U.S. 528, 538 (2005) (*Lucas* takings are "deemed *per se* takings," just like physical invasion takings.); *id.* at 539 ("In the *Lucas* context, . . . the complete elimination of a property's value is the determinative factor.").

Investment-backed expectations are not relevant to a *Lucas* taking. As the Court explained in that case, when regulation eliminates all economic use of land, a compensable taking necessarily results unless the Government can show that the limitation imposed by the regulation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" 505 U.S. at 1029. "Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the [regulation] is taking nothing." *Id.* at 1031-32. Here, the Government does not contend that its ability to regulate wetlands at Plat 57 "inheres" in Lost Tree's title, as part of background principles of property or nuisance law. Nor could the Government make that claim. Federal

wetlands regulation is by statute, the Clean Air Act, and its implementing regulations. 42 U.S.C. § 7401, *et seq.*; *see, e.g.,* 40 C.F.R. pt. 230. Florida also regulates wetlands through statutes and regulations, not under background principles of nuisance of property law. *See* FLA. STAT. §§ 373.4131, 373.414, FLA. ADMIN. CODE 62-330.

Accordingly, the Government's suggestion that consideration of investment-backed expectations could make a difference in this case is contrary to the core holding of *Lucas*. The argument the Government wants to make is that the federal regulatory scheme governing wetlands undermines Lost Tree's investment-backed expectations and thereby might defeat the taking in this case. The trial court already foreclosed that argument by finding factually that Lost Tree had reasonable investment-backed expectations for Plat 57, *despite* "the regulatory scheme then in place." Pet.App. 125a ,128a. But even apart from that established fact, given the narrow defense carved out in *Lucas*, no showing the Government could make regarding wetlands regulation – or its impact on investment-backed expectations – could defeat the *Lucas* taking here. Only background principles of law inhering in Lost Tree's title could allow the Government to escape takings liability for its complete wipe-out of Plat 57's value. The Government does not, and could not, claim such a defense.

The Federal Circuit had no need to discuss these principles in this case, and did not do so. The court explained that investment-backed expectations are irrelevant under *Lucas* in thorough opinions in an earlier case, just after *Lucas* was decided, which the court cited here. *See Palm Beach Isles Assocs. v. United States,* 208

F.3d 1374 (Fed. Cir. 2000), *aff'd on reh'g,* 231 F.3d 1354 (Fed. Cir. 2000); Pet.App. 7a. The Government claims that other precedent disagrees with the Federal Circuit's understanding of the narrow *Lucas* defense, *see* Pet. at 26, but that is not correct. The South Carolina Supreme Court decision the Government cites was vacated and remanded by this Court, as the Government acknowledges, Pet. at 26, and on remand the South Carolina court applied the *Lucas* defense without addressing investment-backed expectations. *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 148-50 & n.5 (S.C. 2003). The language the Government likes and quotes from the supposedly inconsistent Eleventh Circuit decision, *see* Pet. at 26, is also inapposite, because that case did not involve a *Lucas* taking. The property involved there could still be developed, for a single residence, after the regulatory imposition. *See Reahard v. Lee Cty.,* 968 F.2d 1131, 1133 (11th Cir. 1992). Thus, the Government cites no lower court decision in the twenty-four years since *Lucas* was decided – and Lost Tree is aware of none– that disagrees with the Federal Circuit's understanding that investment-backed-expectations are not relevant to the narrow defense this Court recognized in *Lucas*.

The Government nevertheless attempts to discredit the Federal Circuit's understanding of *Lucas* in other ways, but none of those has merit either. First, while acknowledging that *Lucas* stated a total taking "'is compensable without . . . inquiry into the public interest advanced in support of the restraint,'" the Government contends that reasonable investment-backed expectations are a separate factor, which *Lucas* did not address. Pet. at 23-24 (quoting *Lucas*, 505 U.S. at 1015). That is a false distinction, at least on the facts here. The Government

seeks to advance the "public interest" in regulating wetlands, by suggesting such regulation diminishes Lost Tree's property rights by impacting its development expectations. *See* Pet. at 21. That claim is foreclosed by *Lucas*, where the Court explained that:

> Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved. . . . We believe similar treatment must be accorded confiscatory takings *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership.

See Lucas, 505 U.S. at 1028-29[6]

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6. The Government repeatedly mentions "regulatory restrictions" in place when Lost Tree acquired the property, *e.g.*, Pet. at 27, 28, an apparent reference to the state and federal wetlands permitting requirements. *See* Pet. at 21 ("CWA restrictions"). Lost Tree obtained a state permit for Plat 57, Opp.App. 36a, and the reach of the federal wetlands regulations was relatively limited when Lost Tree acquired the John's Island property in 1974, before the regulations were revised and strengthened in 1975 and 1977. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985). But even in 2001, when Lost Tree sought to develop Plat 57, the trial court found the "regulatory regime then in place" was not inconsistent with Lost

Second, the Government cites Justice Kennedy's concurrence in *Lucas*, Pet. at 24, but in arguing for consideration of certain broader regulatory restrictions – and their impact on investment-backed expectations – Justice Kennedy expressly disagreed with the majority's view that only "background" legal principles "inher[ing]" in title could defeat a *Lucas* taking. *See* 505 U.S. at 1035 (Kennedy, J., concurring) ("In my view, the common law of nuisance is too narrow a confine for the exercise of regulatory power."). The majority view in *Lucas* controls, as the Federal Circuit has recognized.

Third, the Government suggests investment-backed expectations always have "particular significance" in regulatory takings cases, citing *Penn Central* and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). *See* Pet. at 20-23. But the circumstances giving rise to a "categorical" *Lucas* taking –elimination of all economic use of a real property parcel – are an *exception* to the "ad hoc" analysis required by *Penn Central*, where investment-backed expectations can be important. *See Lingle*, 544 U.S. at 538. *Penn Central* is therefore no help to the Government on this point.

Monsanto is also readily distinguishable. That case did not involve a regulatory scheme like that involved here under which a permit might or might not be granted. Instead, *Monsanto* involved a statute stating explicitly that during one time period, "EPA could use [Monsanto's trade secret] data without Monsanto's permission," 467 U.S. at 1006, and during another time

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Tree's "objectively reasonable" development expectations for the parcel. Pet.App. 125a, 128a.

period "gave Monsanto explicit assurance that EPA was prohibited from disclosing [such] data," *id.* at 1011. Given that statutory language, this Court concluded that during the first time period, "*Monsanto* could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential," *id.* at 1006, but during the second time period, the "explicit governmental guarantee [of confidentiality] formed the basis of a reasonable, investment-backed expectation," *id.* at 1011. It was in those circumstances, based on that statutory language, that the Court found the investment-backed expectations factor to dispose of the takings question.

Nothing like that is involved in this case. To the contrary, *Penn Central* and *Monsanto* both illustrate that the concept of "investment-backed expectations" arose and has been applied in cases involving the definition of property rights, not cases – like *Lucas* and this one – focused on the deprivation of property rights. *Penn Central*, where the Court apparently first used the term "investment-backed expectations," involved whether the "air rights" above Grand Central Terminal could be considered a distinct property interest for takings purposes. *See* 438 U.S. at 130. *Monsanto* similarly involved whether and under what circumstances trade secrets would be protected as property under the Takings Clause. 467 U.S. at 1000-04.

The questions of property definition and protection involved in *Penn Central* and *Monsanto*, which made investment-backed expectations important in those cases, are not present in this case. Lost Tree holds fee simple title to Plat 57, which as *Lucas* recognized, "is an estate with a rich tradition of protection at common law." 505

U.S. at 1006 n. 7. The right to develop is inherent in that title, regardless of the circumstances of its acquisition and even if the owner obtained the real property by gift or devise with no investment whatsoever.

There also is no support, in precedent or principle, for the Government's suggestion that the right to sue for a regulatory taking of real property depends on the owner's development expectations, or investment, at the time of acquisition – whether by purchase, gift, or otherwise. *See* Pet. at 22. Zoning requirements change over time, and so do development plans. As a result, many landowners form new, or different, or additional development expectations for their property after the date they first acquired it. And as that occurs, the property owners may reasonably make investments in their property based on those new expectations. That is what happened with respect to Plat 57, and as the trial court expressly found, Lost Tree's resulting investment-backed expectations for the parcel were "objectively reasonable." Pet.App. 56a, 125a, 128a; *see also* Pet.App. 56a (Finding that even at the time of acquisition in 1974, "Lost Tree had developed overarching, unspecific development expectations [for the property], including the portion that eventually became Plat 57.").

Ultimately, even in a *Penn Central* case, where investment –backed expectations can be important, what matters is "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. Here, there can be no question that the Corps' permit denial *destroyed* Lost Tree's "objectively reasonable" development expectations for Plat 57 by precluding development altogether. The trial court found the permit denial was a compensable taking under *Penn*

Central as well as under *Lucas*, and in applying *Penn Central*, the court took account of Lost Tree's investment-backed expectations. Pet.App. 54a-58a. The court found that *Penn Central's* "economic impact" factor weighed "strongly" in Lost Tree's favor because the permit denial caused a 99.4% diminution in the value of Plat 57. Pet.App. 57a; *see* Pet.App. 52a-54a (explaining 99.4% diminution in value). The court also found that *Penn Central's* "character" factor favored Lost Tree because "the Corps singled out Lost Tree for adverse treatment." Pet.App. 55a-56a.

The Federal Circuit did not reach the trial court's alternative conclusion that the permit denial at Plat 57 is a taking under *Penn Central*, Pet.App. 14a, but that conclusion is yet another reason this case is a poor vehicle for further review of the role of investment-backed expectations. Addressing the issue here would not change the result in this case.

Further review is unwarranted.

III. The Two Different Questions Presented Are No More Worthy of Review In Combination.

Just as each of the two different questions the petition presents is unworthy of further review, there is no support for the Government's claim that "disturbing consequences" "result from combining" the two unrelated Federal Circuit rulings. Pet. at 27. That claim is a make-weight. The Government's first supporting argument is that the Federal Circuit "rewarded [Lost Tree] for *not* having investment-backed expectations." Pet. at 28. As Lost Tree has emphasized already, that is incorrect and

contrary to the trial court's factual finding that Lost Tree had distinct and reasonable investment-backed expectations for Plat 57.

The Government also complains, repeatedly, that the net result of the two Federal Circuit rulings is a $4.2 million just compensation award for the taking of property that Lost Tree purchased for $5370. Pet. at 3, 14, 28. That comparison has no legal relevance. The $5370 figure is the cost of raw coastal land in 1974. The Government does not and could not claim that a property's purchase price has any role in the takings analysis. Conversely, the $4.2 million figure is the fair market value of Plat 57 fully-developed in 2004. Pet.App. 52a-54a. That is what the Government took when it eliminated all economic use of Plat 57, and that is the settled measure of just compensation. *See, e.g., Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973). There is nothing unfair or "unjust," Pet. at 14, about awarding Lost Tree the fair market value of the property the Government took.

Finally, the Government claims the Federal Circuit's rulings in this case, taken together, create an incentive for real estate developers to engage in inappropriate strategic behavior. According to the Government, the rulings will allow developers to acquire uplands and wetlands together, then develop the uplands first, apply for a permit to develop the wetlands, and when the permit is denied, sue for a taking. Pet. at 29.

The Government has been raising exactly that same spectre at least since 1994. *See Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1181 (Fed. Cir. 1994). In the twenty-two years since *Loveladies*, however, Lost

Tree is unaware of any case in which a takings claimant has succeeded through such strategic behavior – and the Government cites no such case. Instead, the petition cites only a like concern voiced by the one Federal Circuit Judge who dissented from the denial of en banc review in *Palm Beach Isles*. Pet. at 28-29. At that time the remaining Judges on the court were unimpressed by the Government's concern, and in this case, the three-Judge panel explicitly rejected it:

> The government argues that the trial court's holding will allow speculators to purchase regulated property cheaply, apply for a development permit, and, if the permit is denied, succeed on a *Lucas* claim. We disagree. Lost Tree argues persuasively that "[i]n the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits."

Pet.App. 13a.

The Government does not claim that Lost Tree engaged in any inappropriate strategic behavior, and given the factual record, no such claim could be made. The Government's concerns are both imaginary and contrary to the "flexible approach" the Federal Circuit applies to the relevant parcel question, Pet.App. 25a, which the petition also appears implicitly to endorse. *See* Pet. at 16 (advocating consideration of "all the relevant factors."). Under that approach the proper response – if some other case ever did reveal inappropriate strategic behavior – would be to declare that the otherwise

applicable precedent does not apply to facts "created" by such conduct. *See also Arkansas Game and Fish Comm'n v. United States,* 133 S. Ct. 511, 521 (2012) ("Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. . . . We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. . . . The sky did not fall after [*United States v.*] *Causby* [328 U.S. 256 (1946)], and today's modest decision augurs no deluge of takings liability.").

Thus, whether the questions presented in the petition are considered alone or together, there is no reason for further review of either, let alone both of them.

IV. It Would Be Inappropriate and Unjust to Hold the Petition Pending a Decision In *Murr*.

The Court also should deny the Government's request to hold the petition pending a decision in *Murr v. Wisconsin*, No. 15-215, and "then dispose of the petition in light of that decision." Pet. at 31. The Court's decision in *Murr* can have no effect on the outcome of this case. *Murr* presents the question whether "two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes." *See* Petitioner's Brief of Petitioner at i.

In this case, Plat 57 is not contiguous with any other property parcel owned by Lost Tree. *See* p. 13, *supra*; *see also* Opp.App. 31a-32a, 25a. Therefore, whether the Court concludes in *Murr* that commonly-owned contiguous parcels must be considered together, or that they need

not be, the Court's decision will have no bearing on the Federal Circuit's conclusion that Plat 57 should be considered alone in the takings analysis. Moreover, the Federal Circuit, while recognizing that Plat 57 was 323 feet away from the nearest other property Lost Tree owned in the John's Island community, Pet.App. 19a-20a, also based its decision that Plat 57 should be considered alone on numerous additional factors rooted in the trial court's extensive factual findings. *See* Pet.App. 26a-29a. Those other factors are both persuasive and not at issue in *Murr*.

There is, accordingly, no basis for holding the petition pending a decision in *Murr*.

CONCLUSION

Lost Tree instituted this suit in 2008 and has persevered through: extensive discovery and stipulations; a seven-day trial; two Federal Circuit appeals in which Lost Tree prevailed; two Government petitions for rehearing en banc by the Federal Circuit, which that court denied; and now the Government's petition for a writ of certiorari, which lacks merit. Given that history, the "justice and fairness" at the heart of the Takings Clause, *see Armstrong v. United States*, 364 U.S. 40 (1960), provides yet another reason for the Court to deny the petition and allow this case to conclude.

Respectfully submitted,

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May 3, 2016

APPENDIX

APPENDIX A — AMENDED STIPULATIONS OF FACT IN THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED APRIL 12, 2011

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 08-117 L

LOST TREE VILLAGE CORP.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Honorable Charles F. Lettow

Filed electronically: April 12, 2011

AMENDED STIPULATIONS OF FACT

Plaintiff Lost Tree Village Corporation ("Lost Tree") and defendant The United States of America hereby give notice of the filing of the following amended stipulations of fact. On December 18, 2009, the parties filed stipulations of fact in this case. Upon preparation for trial, however, the parties discovered mistakes in paragraphs 76, 77, and 93 of the stipulations of fact filed in December 2009. As such, the parties are filing these amended stipulations with corrections to paragraphs 76, 77, and 93. The remainder of the paragraphs in the following amended stipulations of fact are identical to those filed on December 18, 2009.

Appendix A

I. Lost Tree Village Corporation Overview

1. Lost Tree Village Corporation is a Florida corporation.

2. Lost Tree has the following corporate history. In 1959, Lost Tree Village Corporation was incorporated in the State of Florida. Lost Tree, Inc. was a separate corporation organized in 1959 in Michigan and run by E. Llywd Ecclestone Sr. In 1961, those two companies plus Westport Utilities combined to form a single corporation, known as Lost Tree Village Corporation, and Mr. Ecclestone Sr. acquired control of the combined company.

3. During the 1960s, Lost Tree developed a residential community, known as Lost Tree Village, on approximately 450 acres east of North Palm Beach, Florida.

4. Lost Tree's current shareholders are Mr. Ecclestone Sr.'s daughter, Helen Ecclestone Stone, and two trusts, the Margaret B. Shaffer, Subchapter S Trust and the Sheila Biggs, Subchapter S Trust. Mrs. Stone owns 93.6% of Lost Tree's shares. Mrs. Schaffer and Mrs. Biggs are Mrs. Stone's daughters.

5. Charles M. Bayer, Jr. became the President of Lost Tree in 1994, and since then has been primarily responsible for all business and financial operations of the company.

6. Certain real estate development activities of Lost Tree from approximately the 1970's through the 1990's are

referenced in these Stipulations. Many of the planning and other documents relating to those real estate development activities have been lost or destroyed through various office and storage space moves; the dissolution of Lost Tree's engineering firm, Lloyd & Associates; and several hurricanes and floods that impacted document storage areas including a major hurricane in 2004.

II. Acquisition Of Property Covered By the 1968 Option Agreement

7. In 1968, Lost Tree entered into an option agreement (the "1968 Option Agreement") with the descendants of Fred R. Tuerk.

8. The 1968 Option Agreement allowed Lost Tree, through the exercise of several separate options, to purchase approximately 2,750 acres of property in Indian River County on the mid-Atlantic coast of Florida near Vero Beach from Fred R. Tuerk's descendants. Exhibit A to these Stipulations is a copy of the 1968 Option Agreement.[1]

9. The 1968 Option Agreement covered various land, including land both east and west of the coastal road known as Highway A-1-A, a peninsula known as the Island of John's Island, McCuller's Point, Gem Island, Pine Island, Sister Island, Hole-in-the-Wall Island, Fritz Island

1. Record citations are provided for some stipulated facts for reference. The parties do not necessarily agree with statements in the references. However, all facts set forth in the text of these Stipulations are agreed to by the parties.

and various other islands as well as submerged lands in and around the Indian River, as well as approximately 35 acres about five miles due west of Gem Island (the "West Acreage").

10. The conveyance schedule included as exhibit 2 in the 1968 Option Agreement shows that Conveyance "A" covers property on the mainland east of Highway A-1-A; Conveyance "B" covers property on the mainland west of Highway A-1-A to the Indian River; Conveyance "C" covers property on the Island of John's Island and other parcels generally to the west of Conveyances "A" and "B" and along or in the Indian River; Conveyance "D" covers Gem Island, also west of Parcels "A" and "B" and in the Indian River; Conveyance "E" covers Pine Island; and Conveyance "F" covers the so-called No-Access Islands, including Hole-in-the-Wall Island, Sister Island, the Lost Tree Islands, and others. The conveyance schedule also lists conveyances "G" through ""I" and miscellaneous submerged lands. Exhibit A at LTVC015324.

11. Exhibit B to these Stipulations is a map that shows substantially all of the property covered by the 1968 Option Agreement (except for the West Acreage, which is approximately five miles due west of the area depicted on Exhibit B and a ten acre parcel approximately one quarter mile north of the areas depicted on Exhibit B). As shown on Exhibit B, not all of the property is contiguous.

12. Through a series of deeds executed in February, 1969, Lost Tree exercised the first of its option take downs pursuant to the 1968 Option Agreement. The deeds are

recorded at the following books and pages of the Official Record Books of the office of the Clerk of the Circuit Court of Indian River County, Florida:

Book 308 page 213; Book 308 page 238; Book 308 page 260; Book 308 page 271; Book 308 page 281; Book 308 page 290; Book 312 page 307.

LTVC015488-498; LTVC015499-508; LTVC015509-517; LTVC015518-526; LTVC 015538-549; LTVC015456-460; LTVC015761-868.

13. Lost Tree exercised five additional option take downs to acquire the remaining property covered by the 1968 Option Agreement. These five additional transactions pursuant to the 1968 Option Agreement are reflected in deeds bearing the following dates:

- February 5, 1970;
- November 5, 1971 (which was corrected on December 6, 1971 and January 10, 1972);
- September 7, 1972;
- September 7, 1973;
- August 12, 1974.

LTVC016847-55; LTVC016123-127, LTVC016121-122, LTVC015410-411; LTVC015976-979; LTVC006898-900; LTVC016185 (Aug. 74), Dep. Ex. 4. . Some but not all of these six takedown transactions track the conveyance schedule mentioned in paragraph 10 above.

14. On August 12, 1974, Lost Tree exercised the option that included Conveyance "C," which covered various parcels, including property now referred to as "Plat 57." For convenience these Stipulations refer to that property as Plat 57 in all time periods, even though the preliminary plat for the property was approved in 2002.

15. By 1974, Lost Tree had acquired substantially all the property covered by the 1968 Option Agreement. Bayer Dep. 40:7-13.

III. Development At The Community of John's Island Into The 1990s

16. The 1968 Option Agreement mentions "a tentative land development plan depicting proposed development of all of the land that extends from the Indian River to the Atlantic Ocean plus the lands comprising John's Island." Exhibit A at LTVC015300.

17. Neither a plan such as that noted in paragraph 16 above, nor any plan for developing all of the property covered by the 1968 Option Agreement has been found. Certain plans and proposals relating to development and sale of certain portions of the property covered by the 1968 Option Agreement are addressed below.

18. Beginning in 1969, and continuing for many years, Lost Tree developed certain parts of the property covered by the 1968 Option Agreement (comprising approximately 1300 of the approximately 2750 acres covered by the option agreement) into an upscale gated residential community known as John's Island (referred to herein as "the community of John's Island").

19. Exhibit C to these Stipulations is a map showing a portion of the property covered by the 1968 Option Agreement, on which has been drawn a purple circle that encompasses what most knowledgeable people would consider to be the community of John's Island. Bayer Dep. 35:25-36:13.

20. Certain parcels within the purple circle on Exhibit C, for example the property within the orange circle on Exhibit C, were not covered by the 1968 Option Agreement and have never been owned by Lost Tree.

A. Development of Barrier Island

21. Beginning in 1969, Lost Tree began to develop the property covered by Conveyances "A" and "B" under the 1968 Option Agreement, which is on an unnamed barrier island immediately adjacent to the Atlantic Ocean. (the "Barrier Island"). Bayer Dep. 63:9-13. This property was purchased by Lost Tree in February, 1969, in the first of the six take down transactions made pursuant to the 1968 Option Agreement. The Barrier Island consists generally of property east of the Indian River and west of the Atlantic Ocean, on both sides of Highway A-1-A.

22. Lost Tree developed infrastructure for the Barrier Island property, including streets, water and electric utility service, sewage collection systems and a sewage treatment plant, and amenities including two championship golf courses west of Highway A-1-A and a beach club on the Atlantic Coast. LTVC007248.

23. Lost Tree's initial development on the Barrier Island consisted of the South Golf Course, as well as condominiums, golf cottages, and homes in the vicinity of the South Golf Course. This initial development was platted with the Town of Indian River Shores by a plat entitled "John's Island Plat 1" in March 1969. LTVC014759-776.

24. As constructed, the portion of the community of John's Island located on the Barrier Island included two golf courses (built in 1969 and 1970), a beach club, golf cottages, a private hotel facility, and about 800 individual dwelling units. LTVC007248. All of Lost Tree's development in the 1970s of property covered by the 1968 Option Agreement took place on the Barrier Island. By the mid-1980s, nearly all of the lots and condominiums on the Barrier Island had been developed and sold.

25. From 1969 until the mid-1980's, Lost Tree recorded approximately 45 different plats covering distinct parcels on the Barrier Island. Most of the parcels covered by these plats contained multiple lots for single family homes, although some plats, primarily east of Highway A-1-A on the Atlantic coast, were for multi-family condominiums. Exhibit D to these Stipulations is a map showing the approximate location of these 45 plats, as well as the

approximate location of subsequently recorded plats on the Island of John's Island and Gem Island (both discussed below) and the date each respective plat was recorded, together with a listing of all the plats.

26. Exhibit E to these Stipulations contains copies of all plats referenced on Exhibit D. All the plats are entitled "John's Island – Plat [Number]," except Plat 52, which is entitled "Gem Island Subdivision," with the notation below in smaller letters, "Being Plat 52 of John's Island."

27. The property identified and included in each plat recorded by Lost Tree within the community of John's Island includes both 1) proposed homesite (or condominium) lots, identified by "lot" number, e.g., "Lot 1," and 2) other adjacent, property such as wetlands or submerged lands that Lost Tree included in the plat with the lots, generally identified by "tract" letter, e.g., "Tract A," or as a conservation easement.

For example:

a. Plat 29 includes, in addition to lot numbers 1 and 64 through 82, tract B, and tract C, a lake.

b. Plat 49 includes, in addition to lot numbers 39 to 40 and 134 through 153, tracts A, B and C.

c. Plat 33 includes, in addition to lot numbers 1 through 5, tracts A through L. Page 1 of Plat 33 states "Lost Tree Village Corporation expressly reserves tracts C, D, E, F, G, H, I, J, K and L to itself, its successors

and assigns, the right to a future conveyance of all or some of the tracts to the John's Island Property Owners Association, Inc. as common areas, or in the alternative, Lost Tree Village Corporation may convey all or some of the tracts to the owners of lots adjacent to these tracts."

d. Plat 54 includes, in addition to lot numbers 1 through 3, property labeled as "conservation easement[s]" A through G as well as property labeled as "submerged lands."

e. Plat 40 includes, in addition to lot numbers 1 through 6, tracts A through E, and also references "unplatted land."

f. Plat 51 includes, in addition to lot numbers 133A and 133B, property labeled as the "approximate edge of wetlands and vegetation" and property labeled as "submerged lands."

g. Plat 53 includes, in addition to lot numbers 38 through 40 and 146 through 150, "Tract 'A' conservation easement" and "Tract 'B' conservation easement."

h. Plat 57 is for a single lot, lot number 1, which the plat states is in "Section 13, Township 32 South, Range 39 East, Town of Indian River Shores." On Plat 57, property to the east of Lot 1 is labeled as "unplatted."

B. Development of The Island of John's Island and Gem Island

1. Overview

28. In the late 1970s, Lost Tree addressed development of the property covered by Conveyance "C" in the 1968 Option Agreement, a peninsula to the west of (and generally across the Indian River from) the Barrier Island known as the "Island of John's Island," and the property covered by Conveyance "D" of the 1968 Option Agreement, an island to the northwest known as Gem Island. This property was purchased by Lost Tree on August 12, 1974, in the last of the six take down transactions made pursuant to the 1968 Option Agreement. Exhibit F. A copy of the August 12, 1974 deed evidencing the last of the six transactions pursuant to the 1968 Option Agreement is Exhibit F to these Stipulations.

29. The peninsula that is the Island of John's Island extends south of and outside the purple circle on Exhibit C. Under the 1968 Option Agreement, Lost Tree acquired and still owns property to the south of the Island of John's Island and outside the purple circle on Exhibit C to these Stipulations.

30. Stingaree Point is a smaller peninsula on the west side of, and at the southern end of, the Island of John's Island. Plat 57, at issue in this case, is on Stingaree Point. *See* Exhibit C, (with north at the top of the page, Stingaree Point is located at the very bottom left inside of the purple circle).

31. Gem Island is an island in the Indian River due north of the Island of John's Island. *See* Exhibit C (with north at the top of the page, Gem Island is at the very top left inside of the purple circle).

32. Development of the Island of John's Island and Gem Island began in the early 1980s and continued until the 1990s. The various segments of the development on the Island of John's Island and Gem Island were approved by the Town of Indian River Shores in approximately 21 different plats (including Plats 25-26, 29, 31, 33-34, 40, 44, 46, 48-49, 51-54, and 57. Exhibit D. LTVC014759-776. All these plats contained lots for single family homes.

33. The first plat filed for the development of home sites on the Island of John's Island was Plat 25, which was filed with the Town of Indian River Shores in May 1980 and replatted sometime in 1982. Exhibit D; Melchiori Dep. 19:7-25. In the 1980s and early 1990s, Lost Tree sold the then-platted lots on the Island of John's Island to individuals who generally contracted to build homes on the lots. As noted below, lots on Gem Island were not platted until 1989.

34. In August 1980, Lloyd & Associates, an engineering consulting firm, prepared for Lost Tree a document entitled: "Development Plan – Island of John's Island and Gem Island" ("the 1980 Development Plan"). A copy of the 1980 Development Plan from Lost Tree's files is attached as Exhibit G to these Stipulations. The 1980 Development Plan accompanied the 1980 Permit Application submitted to the Corps of Engineers, which is discussed below in paragraph 44 and others.

35. The 1980 Development Plan includes several project drawings, many of which are entitled "Plan for the Development of the Islands of John's Island and Gem Island." On one such drawing with that title, which is color-coded, the legend indicates that areas shaded in green are "Proposed Wildlife Preserve." Ex. G at LTVCOS0065. On that drawing, a substantial portion of Plat 57 is shaded in green and has the words "wildlife preserve" typed over top of the green shading.

36. The 1980 Development Plan states, at p. 3, "Essentially, the plan calls for development of the roughly 300 acre island of John's Island and 100 acre Island of Gem Island. The development is located in its entirety in Sections 12 and 13, Township 32 South, Range 39 East, and the West ½ of the Southwest 1/4 of Section 18, township 32 South, Range 40 East, as previously mentioned, all within the Town of Indian River Shores in Indian River County, Florida." Exhibit G at LTVCOS0041.

37. The 1980 Development Plan states, at p. 4, "These improvements will interconnect the John's Island Development [on the Barrier Island] with the Island of John's Island and . . . Gem Island." Exhibit G at LTVCOS0042.

38. The 1980 Development Plan states, at p. 11, "Perpetuation of wildlife preserves consisting primarily of heavily populated mangroves will provide a natural form of wave energy dissipation from less severe storms." Exhibit G at LTVCOS0049.

39. The 1980 Development Plan states, at p. 13, "The development concept of the Island of John's Island and Gem Island relies upon the natural recreational interchange between people and an aesthetically beautiful environment such as the materialization of the proposed development in co-operation with its natural beauty." Exhibit G at LTVCOS0051.

40. The 1980 Development Plan states, at p. 14, "Essentially the plan for the Island of John's Island and Gem Island proposes the creation of some 200 single family residences on about 400 acres of land . . . . The development is 90% in existing upland areas requiring no governmental regulatory agency permitting. Protection of some 35.37 acres of existing mangrove islands is proposed as per John's Island Preservation Society agreement and the owner, Lost Tree Village Corporation" Exhibit G at LTVCOS0052.

41. The 1980 Development Plan states, at p. 4, "The mangrove islands, totaling about 35.37 acres, are to become wildlife preserves as per agreement between Lost Tree Village Corporation and John's Island Preservation Society. This will ensure that these environmentally productive areas are kept in their natural state." Exhibit G at LTVCOS0042.

42. If one exists, no copy of any agreement with the John's Island Preservation Society has been found.

43. The 1980 Development Plan addressed the following:

a. Construction of the Sandpiper Causeway to connect the existing development at the community of John's Island on the Barrier Island to the Island of John's Island via Sandpiper Road;

b. Placement of culverts under the existing Fred Tuerk Drive near the south end of the Island of John's Island to allow water from John's Island Sound to flow into the Indian River;

c. Construction of a bridge and causeway to connect the Island of John's Island to Gem Island;

d. The dredging of various canals in wetland areas around the Island of John's Island, including a U-shaped canal that would roughly overlap Chamber's Cove;

e. The placement of fill in some wetland areas on the Island of John's Island to create lots that could be developed for residential use; and

f. The platting of approximately 200 single family residential home sites on the Island of John's Island and Gem Island.

In the 1980 Permit Application as originally submitted, Lost Tree sought approval for the infrastructure improvements noted above in subparagraphs a. and c.-e.

2. Corps of Engineers Permit Application 80-1820

44. In August 1980, Lost Tree submitted a permit application (the "1980 Permit Application") for a Clean Water Act section 404 permit to the United States Army Corps of Engineers ("Corps"). The 1980 Permit Application was designated as application 80-1820 by the Corps. As discussed in paragraph 58 below, included in Exhibit K to these Stipulations are copies of materials that Lost Tree submitted to the Corps in connection with the 1980 Permit Application. Exhibit K at ID00754-828.

45. The 1980 Permit Application also served as an application to the State of Florida Department of Environmental Regulation ("Florida DER"). Exhibit K at LTVC001462

46. The drawings for the 1980 Permit Application were prepared for Lost Tree by a civil engineering and surveying firm called Lloyd & Associates. Melchiori Dep. 10:7-10.

47. The 1980 Permit Application sought authority to install two causeways (the Sandpiper Causeway and a causeway to Gem Island), create several canals, and fill wetlands to facilitate residential development. Bayer Dep. 172:22-173:4.

48. On January 20, 1982, the State sent a letter to Lost Tree outlining changes that would be required to the 1980 Permit Application to gain approval from the State. The modifications included:

a. Deletion of several canals;

b. Realignment of the remaining canal;

c. Reduction in the amount of fill to be placed;

d. Reduction of the width of the Sandpiper Causeway and installation of additional culverts under the causeway;

e. Deletion of the causeway to Gem Island.

ID00567-569. Exhibit H to these Stipulations is a copy of the January 20, 1982 letter.

49. By the Spring of 1982, the Corps had determined that it was prepared to issue a permit for the work envisioned in the 1980 Permit Application.

50. The Corps cannot issue a permit pursuant to section 404 of the Clean Water Act unless and until the applicable state entity either grants water quality certification through the issuance of a state permit or waives certification explicitly or implicitly by failing to act on a request for certification in a timely manner. *See* 33 C.F.R. 325.2(b)(1)(ii).

51. On April 6, 1982, because the Florida DER had not taken action on Lost Tree's application, the Corps wrote to the State reflecting the Corps' position that unless the State requested otherwise, the Corps was prepared to issue the permit sought by the application. Exhibit I to these Stipulations is a copy of the April 6, 1982 letter.

52. On April 9, 1982, the State responded to the letter from the Corps indicating that it found the project as proposed objectionable and asking the Corps to take no action on the Section 404 permit until the State had completed its review and the State permit was either denied or the application was substantially revised. ID00562. Exhibit J to these Stipulations is a copy of the April 9, 1982 letter.

53. The 1980 Permit Application as originally submitted was never acted upon by the Corps of Engineers (i.e., it neither granted the permit nor denied the application).

54. On August 2, 1982, Lost Tree submitted to the Corps a revised proposal which included a set of 17 "revised project drawings." Exhibit K at ID00502-519. The proposal depicted in those revised project drawings varied from the 1980 Permit Application in that, among other things, the causeway and bridge to Gem Island were removed, the amount of fill to be placed was reduced, and three canals were removed, including the U-shaped canal referenced in paragraph 43 d.

55. On October 1, 1982, Lost Tree submitted additional revised plans to the Florida DER and the Corps, Exhibit K at ID00485-501, including a permit application form that was initially labeled as permit application 80-1820, but was sometime later re-labeled as permit application 84-3937 *Id.* at 486. The cover letter to these additional modified plans states that "all originally proposed project features are being deleted from this application except the bridge from Johns to Gem Island and its approaches." *Id.* at 485.

56. On December 7, 1982, the Corps issued a permit no. 80-1820 to Lost Tree ("the 1982 Permit") pursuant to section 404 of the Clean Water Act. Included in Exhibit K to these Stipulations is a copy of the 1982 Permit. Exhibit K at ID00417-442.

57. The 1982 Permit approved only the following:

a. Construction of the Sandpiper Causeway connecting the Barrier Island portion of development in the community of John's Island to the Island of John's Island;

b. Installation of a 4,000 foot canal with a bottom width of 68 feet;

c. Removal of an earthen plug at the southern tip of the Island of John's Island to allow flushing of water in John's Island Sound.

Among several items proposed by Lost Tree and never authorized by any Corps permit or built was the u-shaped canal note in paragraph 43 d.

58. Materials from the files of the Corps – related to (1) the 1980 Permit Application as originally submitted, (2) Lost Tree's revised proposal noted in paragraph 54 above, (3) Lost Tree's modified plans as noted in paragraph 55 above, and (4) the 1982 Permit – are attached as Exhibit K to these Stipulations. ID00416-828. Those materials include the following:

a. The permit application materials that are referenced in paragraph 44 above submitted by Lost Tree to the Florida DER and to the Corps in 1980. Exhibit K at ID00754-828;

b. The public notice of the 1980 Permit Application issued by the Corps of Engineers on May 4, 1981(the "1981 Public Notice"). Exhibit K at ID00673-753;

c. Working files of the Corps of Engineers, including correspondence to and from the Corps of Engineers. Exhibit K at ID00485-672;

d. The decision document prepared by the Corps related to the 1982 Permit Application. Exhibit K at ID00443-456;

e. Permit No. 310589249 issued by the Florida DER on December 3, 1982 related to Lost Tree's revised proposal noted in paragraph 54 above. Exhibit K at ID00458-484; and

f. The 1982 Permit. Exhibit K at ID00417-442.

59. The 1981 Public Notice includes a set of drawings of portions of the Island of John's Island. Plat 57 is depicted on the drawings designated as 41 of 42 and 42 of 42. Exhibit K at ID00717-18 On that drawing, a substantial portion of Plat 57 is labeled "wildlife preserve," with an indicated size of "224,000 s.f. (5.14 ac.)." Another drawing accompanying the 1981 Public Notice labels a significant

portion of Plat 54 (discussed below) as "wildlife preserve" and another portion of Plat 54 as "This is an out parcel not to be platted as a lot." Exhibit K at ID00710. No separate public notice was issued by the Corps for only the improvements authorized by the 1982 Permit.

60. The 1982 Permit, Lost Tree's revised proposal noted in paragraph 54 above, Lost Tree's modified plans as noted in paragraph 55 above, the 1983 Permit Application discussed below, and the 1984 Permit discussed below all attach the same map depicting the region of Indian River County, Florida in which the community of John's Island is located. A section of the map is cross hatched and a label stating "project location" points at the cross-hatched portion of the map. Exhibit K at ID00421, 00490, 00502 & Exhibit L at ID 00835. Plat 57 is within the cross-hatched portion of the map. The copy of that map included with the revised plans noted in paragraph 55 above is marked "Revised," and another map included with those revised plans bears a label stating "project location" with an arrow pointing to the Gem Island causeway and bridge location. Exhibit K at ID00491.

3. Corps of Engineers Permit Application 84-3937

61. On July 8, 1983, Lost Tree submitted another permit application (the "1983 Permit Application") for a Clean Water Act section 404 permit to the Corps. The 1983 Permit Application was designated as application 84-3937 by the Corps. Materials from the files of the Corps related to permit application 84-3937 are attached as Exhibit L to

these Stipulations. ID00831-965. Those materials include the following:

a. A portion of the 1983 Permit Application. Exhibit L at ID00939-951;

b. Working files of the Corps, some of which relate, at least in part, to the work proposed in 1980 Permit Application as originally submitted, which working files include the 1981 Public Notice and correspondence to and from the Corps of Engineers. Exhibit L at ID00852-898, 909-938;

c. The decision document prepared by the Corps related to the 1984 Permit. Exhibit L at ID00899-908;

d. Permit No. 310346959 issued by the Florida DER for work related to work approved by the 1983 Permit Application. Exhibit L at ID00952-964;

e. Permit 84-3937, which was issued by the Corps of Engineers on November 27, 1984 (the "1984 Permit"). Exhibit L at ID00831-850.

62. The 1983 Permit Application also served as an application to the Florida DER.

63. The drawings for the permit application 84-3937 were prepared for Lost Tree by a civil engineering and surveying firm called Lloyd & Associates. The majority of the drawings were prepared by Steve R.Melchiori, who was then an employee of Lloyd & Associates.

64. The 1983 Permit Application sought authority to install a causeway and bridge across Oyster Cut to connect the Island of John's Island with Gem Island.

65. On November 27, 1984 the Corps granted the 1983 Permit Application and issued a permit (the "1984 Permit") to Lost Tree pursuant to section 404 of the Clean Water Act. As noted in paragraph 61 e above, included in Exhibit L to these Stipulations is the 1984 Permit. Exhibit L at ID00831-850.

66. The 1984 Permit approved the installation of a causeway and bridge connecting Gem Island and the Island of John's Island.

4. The 1993 Permit

67. In 1993 the Corps issued to Lost Tree a third permit (the "1993 Permit") in response to a new application filed by Lost Tree on February 21, 1991, for construction of a canal on the north end of the Island of John's Island, near the Gem Island bridge. ID01655. Lost Tree then constructed that canal, which differed somewhat in configuration from the canal near that location sought in the 1980 Permit Application. Exhibit M to these Stipulations is a copy of the 1993 Permit together with material from the Corps' files on the 1993 Permit and the Lost Tree's application for it. Exhibit L at ID01623-1708.

5. Further Development Following Permits

68. Based in part on work authorized by the permits noted above, the Island of John's Island and Gem Island have been developed to include:

a. A bridge and causeway that connects the portion of the community of John's Island on the Barrier Island to the Island of John's Island;

b. Placement of culverts under the existing Fred Tuerk Drive near the south end of the Island of John's Island to allow water from John's Island Sound to flow into the Indian River;

c. A bridge and causeway that connects the Island of John's Island to Gem Island;

d. Approximately 200-210 single family homes on the Island of John's Island and Gem Island.

69. The actual development of the Island of John's Island occurred in a manner that differs in some respects from the 1980 Development Plan or the 1980 Permit Application. Some roads and canals were built in different locations, some canals were never built, and some lots are in different configurations than shown in the 1980 Development Plan and drawings pertaining to permit application 80-1820 and the 1983 Permit Application.

70. Construction of the Sandpiper Causeway, which was completed in the 1980s, "provided access from the main part of [the community of] John's Island to the [Island of John's Island] without having to go outside of the community," allowing homeowners on the Island of John's Island, for example, to "drive to the . . . golf club without having to get outside the community." Melchiori Dep. 12:10-19, 13:14-14:2.

71. Plat 40, covering six lots on the south and east of Stingaree Point, was recorded in November 1985. Within a few years thereafter, Lost Tree sold those lots and homes were constructed on them. The Plat 57 land, which is on the north side of Stingaree Point, is not included in Plat 40.

72. None of the improvements authorized by the 1982 Permit were necessary to provide road access to, or allow development of, Plat 40 or any other part of Stingaree Point.

73. As shown on Exhibit D to these Stipulations, some portions of the Island of John's Island were platted before certain lots on the Barrier Island were platted.

74. An April 30, 1986 appraisal entitled "John's Island Remaining Real Estate and Related Assets," a copy of which is Exhibit N to these Stipulations, states on p. 6 "A project-byproject budget for all remaining development costs to complete John's Island is contained in Exhibit D." Exhibit N at LTVC0013490. Exhibit D to that appraisal does not mention Plat 57, but on p. D-5, entitled "Remaining Development Costs – Stingaree Point," states "Stingaree Point development is substantially completed, with the exception of the entrance area, landscaping and a final layer of asphalt on the road." Exhibit N at LTVC013533.

75. In 1989 Lost Tree recorded a plat, Plat 52, covering all the 40 lots on Gem Island, which are for single family residences. Lost Tree then first began selling lots on Gem Island in 1990, to individuals who generally contracted to build homes on the lots.

76. In October 1995, Lost Tree sold all remaining (unsold) platted lots it owned in the community of John's Island (primarily, lots on Gem Island) to Gem Island Investment LP, which was owned 60% by Mrs. Stone and 20% each by the Margaret B. Shaffer, Subchapter S Trust and the Sheila Biggs, Subchapter S Trust. From 1996 until 1999, Gem Island Investment LP sold the remaining lots on Gem Island to individuals who generally contracted to build homes on the lots.

77. After Lost Tree's sale of the approximately 20 lots to Gem Island Investment LP in 1995, Lost Tree owned no platted lots and a few unplatted parcels within the purple circle on Exhibit C to these Stipulations. Lost Tree had developed and sold approximately 1,380 single family homes and condominiums units on property within the purple circle on Exhibit C from 1969 to the mid 1990's.

78. By the late 1990's, development of the Island of John's Island and Gem Island, and of the community of John's Island, was substantially complete. Together with the homes and condominiums that had previously been developed on the Barrier Island, the community of John's Island had, by the late 1990's, approximately 1,380 single-family homes and condominium units.

79. The community of John's Island as it currently exists "in terms of platting of individual lots" is fairly depicted on the map that is attached as Exhibit C to these Stipulations. Bayer Dep. 71:24-72:20. Another map from Lost Tree's files is attached as Exhibit O to these Stipulations.

IV. Lost Tree's Business Subsequent To The Mid-1990s

80. As development of the community of John's Island neared completion in the late 1990's, and continuing thereafter, the focus of Lost Tree's business changed significantly. With proceeds from that development, Lost Tree acquired, and now manages, a substantial portfolio of investment real estate and other assets in Florida and several other states.

81. Lost Tree hired Mr. Bayer as its President in 1994, in large part because of the changed focus of the company. From the time he joined Lost Tree, Mr. Bayer's responsibilities centered on managing Lost Tree's investment portfolio of real estate and other assets, and also included considering how best to realize value (through sale, development or otherwise) from Lost Tree's remaining real property in Indian River County - i.e., property Lost Tree acquired under the 1968 Option Agreement that Lost Tree still owned.

82. In 1996, to help address the remaining property, Mr. Bayer engaged the assistance of Stephen R. Melchiori, who, among other relevant experience, had previously worked for Lloyd & Associates, the engineering firm that during the 1970's and 1980's provided Lost Tree with much of the infrastructure support work for development of the mainland property, the Island of John's Island and Gem Island. Mr. Melchiori became Lost Tree's Project Manager responsible for permitting and related activities.

83. Soon after Mr. Bayer became President, Lost Tree began to pursue the sale or other disposition of property that Lost Tree still owned and had acquired under the 1968 Option Agreement. That remaining property included the following parcels - a) the West Acreage, consisting of approximately 35 acres located about one mile west of Gem Island across the Indian River; b) the Lost Tree Islands, which consist of approximately 500 acres on several scattered island in the intercoastal waterway; and c) property referred to as the North Acreage, consisting of approximately 100 acres adjacent to the north end of the Barrier Island. All of these parcels are wholly outside the purple circle on Exhibit C.

84. Lost Tree sold most of the North Acreage to an unrelated developer in 1999. That developer has since developed single family homes and condominiums on that property.

85. In 1990, the City of Vero Beach and the Town of Indian River Shores changed zoning requirements to prohibit bridges to the Lost Tree Islands from being built, thereby denying road access. Lost Tree filed suit against the city and town claiming a taking, and eventually settled its taking claims. *See Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla. App., 4th Dist 2002). Pursuant to that settlement, Lost Tree sold the Lost Tree Islands.

86. The West Acreage was sold by Lost Tree in 2004, together with approximately 190 contiguous acres that Lost Tree acquired in the 1980s. That combined property,

plus about five additional acres never owned by Lost Tree, is being developed by another company into a residential community known as Lost Tree Preserve.

87. As of the late 1990's, property remaining from the 1968 Option Agreement that Lost Tree still owned also included a few smaller parcels on the Island of John's Island. Prior to 2000, Lost Tree determined that two parcels were developable. That land later became Plats 54 and 55, respectively.

88. Plat 55, which was recorded in 1998, covers three lots near the base (or east-most part) of Stingaree Point. Lost Tree believed that Plat 55 contained only upland property and thus its development required no permit from the Corps. Lost Tree has developed three lots on Plat 55 as homesites.

89. In July 1997 Lost Tree submitted a section 404 permit application to the Corps for wetlands fill on portions of property that became Plat 54, known as the "Horse's Head" property. Plat 54 includes three lots. For convenience these Stipulations refer to that property as Plat 54 in all time periods, even though the plat for the parcel was not recorded until 2003.

90. Ms. Irene Sadowski was the Corps' project manager for the Plat 54 permit application. Exhibit P to these Stipulations is a copy of the Public Notice dated September 9, 1997 issued by the Corps for the Plat 54 permit application.

91. In November 1997 Lost Tree sold Plat 54 to Horse's Head Ltd. The pending section 404 permit application for Plat 54 was then amended to reflect Horse's Head Ltd. as the applicant.

92. Horse's Head Ltd. is a separate entity with a different ownership structure than Lost Tree. Most of the stock of Horse's Head Ltd. is owned (in equal shares) by the Margaret B. Shaffer Revocable Trust and the Sheila Biggs Revocable Trust. Those Trusts own more than 85% of Horse's Head Ltd.

93. In 2000, Horse's Head Ltd. received a wetlands fill permit from the Corps to fill 2.66 acres of wetlands on Plat 54. Plat 54, which included 3 lots and "conservation easements" A through G, was eventually recorded in February 26, 2003, and Horse's Head Ltd. subsequently sold the lots as home sites. Exhibit Q to these Stipulations is a copy of the section 404 permit the Corps issued for the fill of wetlands on Plat 54.

V. The Planning and Proposed Development of Plat 57

A. Plat 57 Overview

94. Plat 57, at issue in this case, is located on the Island of John's Island and is among the property acquired in 1974 by Lost Tree through the last of the six transactions made pursuant to the 1968 Option Agreement. Bayer Dep. 43:2-6.

95. Plat 57 was a part of the property covered by the 1968 Option Agreement in Conveyance "C", denoted "John's Island, Stingaree Point and lots 9 and 10, section 18, twp. 32 S, Rge. 40 E," which was purchased for $1,500 per acre. See Exhibit A at LTVC015324. For the property that is now Plat 57, which consists of 1.41 acres of submerged lands (assigned no value in the 1968 Option Agreement), and 3.58 acres of wetlands with some uplands, the purchase price was $5,370 - i.e., 3.58 times $1500. The Plat 57 Decision Document discussed in paragraph 119 below, Exhibit U to these Stipulations, states "The area of Plat 57 considered vegetated wetlands is approximately 3.58 acres and the remaining 1.41 acres is considered submerged lands." Calculations furnished by Lost Tree alleged that approximately 0.5 acre of Plat 57 was "spoil mounds that are non-jurisdictional wetlands," which was not verified by the Corps. Exhibit U ("Plat 57 Decision Document") at 2, LTVC014021.

96. Plat 57 is adjacent to other property on the Island of John's Island that was purchased by Lost Tree on August 12, 1974. Bayer Ex. 4 (LTVC16185-198).

97. To the east of Plat 57 is a strip of land that is a mosquito impoundment. That land is separated from the roadway by a utility easement tract that has been deeded to JIPOA. Dep. Ex. 28 at 3. To the east of the mosquito impoundment, 323 feet away, is Plat 55, which was recorded by Lost Tree in 1998. To the north of Plat 57 is the Indian River, specifically an inlet known as Chambers Cove. Plat 57 has approximately 600 feet of waterfrontage on that inlet. To the west of Plat 57 is Lot

1 of Plat 40, which was platted, developed, and built upon in the mid-1980's. To the south of Plat 57 is Stingaree Point Road, which separates Plat 57 from the other lots on Plat 40, which also were developed and sold (and built upon) in the mid-1980's.

98. Plat 57 consists of 4.99 acres. It is located on the north side of Stingaree Point, and is within the purple circle on Exhibit C to these Stipulations.

99. Plat 57 contains a mangrove swamp and wetlands that have been disturbed by scattered upland spoil mounds vegetated by an invasive species of pepper, and by manmade ditches installed for mosquito control.

100. Plat 57 covers an area less than one half of one percent of the approximately 1300 acres comprising the community of John's Island.

101. The property now known as Plat 57 is located within Section 13, Township 32 South, Range 39 East, Indian River County, Florida.

102. Plat 40, covering six lots on Stingaree Point, was recorded in November 1985. Lost Tree provided water and sewer service to those lots at that time (such service was "stubbed out" to those lots, meaning pipes were laid to the property line, and left as stubs pending construction on the lot, at which time sewer and water service would be extended from the stubs at the lot line into the house)). Within a few years thereafter, Lost Tree sold those lots and homes were constructed on them. The

Plat 57 land, which is on the north side of Stingaree Point, is not included in Plat 40.

103. At that time (1985), Lost Tree also stubbed out water and sewer service to another parcel on Stingaree Point, Plat 55. Plat 55 was not recorded until 1998. Lost Tree has never stubbed out such services to Plat 57.

B. The Proposed Development of Plat 57

104. In 2001 and 2002, Mr. Bayer considered whether value could be realized, by way of disposition or otherwise, from any of the few remaining properties that Lost Tree still owned from the 1968 Option Agreement. At that time, such properties consisted of Pine Island, Hole-in the-Wall Island, South Sister Island, the West Acreage, and various submerged lands, smaller mangrove-covered islands, and a few other scattered parcels. Most of these properties are outside the purple circle on Exhibit C to these Stipulations..

105. During this time period (2001-02), Lost Tree considered whether Plat 57 could be developed into one or more waterfront homesites.

106. Mr. Bayer estimated the potential sale price of Plat 57, based on opinions he obtained from real estate brokers, and also considered estimates of costs to develop the parcel, which Mr. Bayer had asked Mr. Melchiori to prepare. One such development cost estimate by Mr. Melchiori for Plat 57 is Exhibit R to these Stipulations. LTVC003512 - 10/28/02.

107. Mr. Bayer's financial assessment indicated that Plat 57 could be developed profitably. In 2002, Mr. Bayer recommended that Lost Tree develop the Plat 57 parcel for sale as one or more homesites.

108. Prior to 2001-02, property within Plat 57 was sometimes left blank in development maps and plans.

109. Once Lost Tree accepted Mr. Bayer's recommendation to attempt to develop Plat 57 for sale as one or more home sites, Lost Tree proceeded to take the necessary steps to pursue such development.

110. On August 2, 2002, Lost Tree filed an application with the Town of Indian River Shores requesting approval for a preliminary plat, as well as a marginal wetlands determination and conditional use authority for the Plat 57 property (the "Town Approvals"), seeking to fill 2.13 acres of wetlands. LTVC001293-307. This fill would have allowed for the development of one residential lot, and one home on that lot.

111. On August 23, 2002 Lost Tree submitted an application (the "Plat 57 Permit Application") for a Clean Water Act section 404 wetlands fill permit from the Corps for fill within Plat 57 only. Exhibit S to these Stipulations is a copy of the Plat 57 Permit Application. Ms. Sadowski was the Corps' project manager for Lost Tree's Plat 57 Permit Application.

112. In connection with the Plat 57 Permit Application 1) the Corps did not request, and Lost Tree did not

make, any written submission regarding possible future wetlands impacts by Lost Tree on other property, and 2) the Corps did not consider or learn of any other possible future plans for wetlands impacts that Lost Tree might have in or near the community of John's Island. Sadowski Dep. 118.

113. In order to file the application with the Town, and for subsequent discussions with the Corps of Engineers and other permitting authorities, Lost Tree hired consultant William Kerr, of BKI Consulting ("BKI"), and a surveyor to analyze and survey the property and the wetlands and prepare appropriate reports.

114. In connection with Lost Tree's effort to develop Plat 57 and obtain appropriate permits and approvals to do so, several other plans and studies also were prepared including: (a) a Comprehensive Assessment of Wetlands on Plat 57 prepared by BKI, Inc. September 2002, which included water quality sampling and analysis, benthic sampling, wildlife sampling and observations and vegetative assessment; (b) an Environmental Assessment of Plat 57 pursuant to section 167.01(c) of the Town of Indian River Shores Land Development Code, prepared by BKI, Inc. in August 2002; (c) a separate Environmental Assessment of Plat 57 included in the permit application to the St. Johns River Water Management District ("SJRWMD") and Corps of Engineers prepared by BKI, Inc. in August 2002; (d) a wetlands restoration/enhancement plan for Plat 57 prepared by BKI, Inc. November 25, 2002; (e) an alternative plans analysis for Plat 57, prepared by Stephen R. Melchiori, August

2002, and included in a June 2003 RAI response to the Army Corps of Engineers; (f) a City of Vero Beach utility concurrency determination September 2002; (g) an Indian River County solid waste concurrency determination September 2002; and (h) various other studies and reports regarding Plat 57 submitted to the Town of Indian River Shores or the SJRWMD.

115. Indian River Shores granted the Town Approvals, including approval of the preliminary plat for Plat 57, at a public meeting in October 24, 2002. The Plat 57 property, as approved by the Town, would allow for one residential home site. The Town Approvals were conditioned on the Town's use of a portion of a mosquito impoundment area on other property owned by Lost Tree, known as McCuller's Point, to receive the Town's collected stormwater as well as the enhancement by Lost Tree of wetlands on McCuller's Point. Thereafter, on November 12, 2002, Lost Tree obtained a permit for Plat 57 from the SJRWMD. LTVC03297-308.

116. The Town Approvals were challenged in litigation by third parties. On November 25, 2002, King Stubbs and Dace Brown Stubbs filed suit against the Town to have the Town Approvals for Plat 57 declared invalid and argued that the wetlands Lost Tree proposed to fill were not marginal wetlands. Lost Tree intervened in the suit as a party defendant. After discovery and a three day non-jury trial, in February 2004 the Florida circuit court found that the Town's grant of the Town Approvals for Plat 57, including the wetlands determination and conditional use by Lost Tree, were consistent with the Town's

Comprehensive Plan and that the Town's determination that the wetlands were marginal was supported by substantial evidence. Exhibit T to these Stipulations is the court's February 23, 2004 final judgment and opinion in that case. LTVC004556-69.

117. Lost Tree also obtained all other local approvals needed and all necessary approvals from the State to develop Plat 57 into a homesite. LTVC003297.

118. By June 28, 2004, when Lost Tree submitted additional information to the Corps during the permit process, the only property still owned by Lost Tree within the purple circle on Exhibit C to these Stipulations, other than Plat 57, that was not platted or subject to or proposed for conservation consisted of a small number of scattered parcels on the Barrier Island, the Island of John's Island, and Gem Island. Exhibit U at 2-3; Exhibit A (map). These parcels all had significant obstacles to development. The Corps agreed that they "may not be viable alternatives." *Id.* at 19. At that time the only platted property Lost Tree owned within the purple circle on Exhibit C was within Plat 55 (Plat 57 was preliminarily approved but not yet recorded).

119. On August 9, 2004, the Corps denied the Plat 57 Permit Application. Exhibit U to these Stipulations is the Corps' decision document denying that application (the "Plat 57 Decision Document").

120. Plat 57 has been assessed by the Indian River County Property Assessor as a separate parcel for

property tax purposes. It has been assessed for real estate tax purposes as having a "CAMA" of $2,590.00 currently, and had a CAMA of $2,860.00 in 2004, when the permit was denied. CAMA refers to the "Computer Assisted Mass Appraisal" system, which the Town of Indian River Shores uses to establish assessed value.

121. Subsequent to the denial of the Section 404 permit by the Corps, Lost Tree has continued to pay taxes on Plat 57.

V. Miscellaneous Facts Regarding The Community of John's Island

122. Construction of homes and condominiums within the community of John's Island has been done by several different builders, most of which were not formally affiliated with Lost Tree.

123. The community of John's Island is a gated community. Access by road requires entry through security gates. Bayer Dep. 127:18-128:1.

124. The community of John's Island today has a homeowner's association known as the John's Island Property Owners Association ("JIPOA"). Today, over 90 percent of the homeowners in the community of John's Island belong to JIPOA. Bayer Dep. 119:19-120:15, 123:10-124:5.

125. As the community of John's Island was developed, differing covenants were recorded and made applicable

to different lots or groups of lots in the community of John's Island. Several different homeowners associations ("HOA") were originally formed on the Barrier Island, the Island of John's Island, and Gem Island. Over a period of time, most if not all of these HOAs eventually merged into the JIPOA.

126. Different members of JIPOA today have different dues structures, depending on where they live. Today, JIPOA provides security services, common area maintenance and architectural review for properties of its members. There are lots within the purple circle on Exhibit C to these Stipulations whose owners are not members of JIPOA, and accordingly, for example, JIPOA has no architectural review authority over those lots, nor any way to collect dues or enforce its rules in any manner against owners of those lots.

127. JIPOA has architectural and design review and approval authority for the majority of homes, but not all (*i.e.,* only of JIPOA members), within the community of John's Island. In the 1970s, promotional sales literature prepared by Lost Tree and labeled "John's Island," a copy of which is Exhibit V to these Stipulations, stated "All plans for new residences must win approval of the John's Island Architectural Board." Exhibit V at LTVC001318.

128. When Gem Island lots were sold in the 1990s, the purchasers became members of a separate Gem Island Property Owners Association, which subsequently was merged into JIPOA. Gem Island lots are subject to separate architectural review criteria, but no longer have a separate architectural review board, as they once did.

129. A summary of a May 6, 2009 JIPOA Board meeting states "CMB [Mr. Bayer] laid out a history of 'anti' or negative positions or actions taken against LTVC [Lost Tree] by JIPOA through the years" and "It was agreed that the history of communication between JIPOA and LTVC has been poor." Dep. Ex. 12, LTVC001144.

130. The Barrier Island portion of the community of John's Island to the east of A1A has two gated entrances. The Barrier Island portion of the community of John's Island to the west of A1A also has two gated entrances. A fifth gated entrance to the community of John's Island is located on the Island of John's Island on Fred Tuerk Drive. The only access by road to the community of John's Island is through the gated entrances.

131. Today, security at the gated entrances as well as throughout the community of John's Island is provided by a security force that is financed and operated by JIPOA. Bayer Dep. 127:24-128:1, 144:11-22.

132. Individuals who own property within the community of John's Island are provided with credentials, which allow them to enter the community through any of the five gated entrances.

133. Plat 57 is located within the gated community of John's Island. Melchiori Dep. 18:5-7; Bayer Dep. 127:21-23.

134. Lost Tree hoped to include the Plat 57 property within the John's Island Property Owners Association. However, Lost Tree has no right to require JIPOA to

accept any future Plat 57 owner/resident as a member. Similarly, Horse's Head Ltd. did not have the right to require JIPOA to accept any future Plat 54 owner/resident as a member. *See* Dep. Ex. 11; Dep. Ex. 12, LTVC001143-44.

135. All of the residential homes within the community of John's Island have "pretty much the same" style of wrought iron mailboxes. Apparently, the only choice enjoyed by the homeowner is whether to select black or white, or large or small. The parties do not know if this is just a custom or is legally required by covenants or otherwise. Bayer Dep. 158:19-21.

136. The community of John's Island provides residents of the community the opportunity to enjoy certain amenities including tennis courts, a beach club, a golf club, and a hotel-style residential building.

137. Within the community of John's Island there is a member-owned golf club (the "John's Island Club") that runs two golf courses within the community of John's Island and a third golf course, constructed in 1986, which is approximately ten miles from the main clubhouse.

138. Membership in the John's Island Club has always been detached from property ownership at the community of John's Island. When Lost Tree sold lots, it did not grant purchasers the right to join the Club, which required separate application and acceptance by the membership committee. Not all residents of the community of John's Island are members of the golf club. There are club

members who are not residents of the community of John's Island.

139. The golf courses were built by Lost Tree, and later sold to the members.

140. Within the community of John's Island there is a member-owned beach club, which is affiliated with the John's Island Club, which operates bathing and beach front amenities, as well as private dining amenities. Certain amenities at the beach club require additional membership.

141. Not all residents of the community of John's Island are members of the beach club. As with the golf club, membership is not automatic with the purchase of residential property in the community of John's Island.

142. The original beach club facilities were constructed by Lost Tree and later sold to the members, who subsequently replaced the original facilities with a new structure.

143. Among the amenities in the community of John's Island is a facility called the Island House. The Island House functions as a hotel, but units are owned and operated by residents of the community of John's Island. Only residents of the community of John's Island may make reservations at the Island House, but outside guests may stay there. Lost Tree has no control over use of the Island House. Bayer Dep. 185:5-12.

144. The community of John's Island includes private streets, water and sewage collection systems, as well as stormwater storage for irrigation. A sewage treatment plant, which serves the community of John's Island and was constructed by Lost Tree, was turned over to the City of Vero Beach in the 1990s. Exhibit G at LTVC007248.

145. Lost Tree was responsible for paying for the construction of most of the private road system throughout the community John's Island. Bayer Dep. 154:4-12.

146. Mr. Melchiori, a consultant for Lost Tree, estimated costs for the potential development of Plat 57. Mr. Melchiori included within those cost estimates the cost of tapping into the common water and sewer system lines that service the community of John's Island. Melchiori Dep. at 36:13-37:13.

147. Maintenance of Stingaree Point Road, the road on which Plat 57 is located, is provided by JIPOA. Bayer 144:14-17.

148. All of the private roads within the confines of John's Island, which provide access to Plat 57, are today maintained by JIPOA, including paving and landscaping along the roadways. Melchiori Dep. 17:14-18:4; Bayer Dep. 139:14-25.

149. The community of John's Island has a single private storm sewer system and homeowners within the community utilize that system. Exhibit G at LTVC007248.

150. The majority of the sewer lines in the community of John's Island were constructed at Lost Tree's expense. Bayer Dep. 155:5-10.

151. There is a common non-potable irrigation water system that is available to most homeowners within the community of John's Island. LTVC00534. This water system was built by one of Lost Tree's affiliated companies as part of the development of the community of John's Island. Lost Tree subsequently sold the non-potable water system to an entity that is controlled by the homeowners in the community of John's Island. LTVC00534; Melchiori Dep. 38:7-21; Bayer Dep. 116:23-118:15.

152. Various landscaped tracts are located throughout the community of John's Island. Most of those landscaped tracts are owned, manicured, and maintained by JIPOA. Bayer Dep. 229:21-230:1.

153. All of the property within the community of John's Island that is located on the Island of John's Island is zoned "R-1A single family residential" by the Town of Indian River Shores. Melchiori Dep. 50:4-25.

154. All of the property within the community of John's Island that is located on Gem Island is zoned "R-1A single family residential" by the Town of Indian River Shores. Melchiori Dep. 50:4-25.

155. Plat 57 is zoned "R-1A single family [residential]" by the Town of Indian River Shores. Melchiori Dep. 50:4-25; LTVC015407.

156. Much of the property within the community of John's Island that is located on the Barrier Island east of highway A1A is zoned R-2A for multi-family residential.

157. Apart from the golf courses, the property that is located on the Barrier Island west of highway A-1-A is zoned R-1A for single-family residential, except for a couple of plats that are zoned R-1B for zero lot line residential and a couple of plats zoned R-2A for multi-family residential.

158. Exhibit W to these Stipulations is a Town of Indian River Shores zoning map, showing zoning classifications adopted in the 1990s that are still in effect.

159. When Mr. Bayer first came to Lost Tree it had about two employees. In 2003 Lost Tree had about five employees, mostly accountants. Bayer Dep. 77:23, 137:25. In 1980, Lost Tree had a staff of about 250 people. Dep. Ex. 6 at 6.

160. Exhibit X to these Stipulations, LTVC020026-29, is the record of the minutes of the March 26, 1987 meeting of the Board of Directors of Lost Tree.

161. Exhibit Y to these Stipulations, LTVC019885-93, is the record of the minutes of the September 4, 1985 meeting of the Board of Directors of Lost Tree.

162. Exhibit Z to these Stipulations, LTVC003006-8, is a facsimile from Mark Gronceski, St. John's Water Management District to Stephen Melchiori, dated 7/13/98.

163. Attached to these Stipulations is a list of Exhibits to these Stipulations.

s/ Jerry Stouck
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Appendix A

Lost Tree Stipulation Exhibits

Exhibit Letter	**Title/ Description**	**Bates**	**Paragraph where Exhibit first described**
Exhibit A	1968 Option Agreement	Dep. Ex. 2 (LTVC015291-325)	8
Exhibit B	Map that shows substantially all of the property covered by the 1968 Option Agreement	No bates	11
Exhibit C	Map showing a portion of the property covered by the 1968 Option Agreement, on which has been drawn a purple circle that encompasses what most knowledgeable people would consider to be the community of John's Island	Dep. Ex. 1 (LTVC016466)	19

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Exhibit D	Map showing the approximate location of the 45 plats, as well as the approximate location of subsequently recorded plats on the Island of John's Island and Gem Island and the date each respective plat was recorded, together with a listing of all the plats	No bates	25
Exhibit E	Copies of all plats referenced on Exhibit D	LTVC20188-322	26
Exhibit F	August 12, 1974 deed evidencing the last of the six transactions pursuant to the 1968 Option Agreement	Dep. Ex. 4 (LTVC016185-198)	28

Exhibit G	1980 Development Plan from Lost Tree's files	LTVC0S0031-211	34
Exhibit H	January 29, 1982 letter	ID00567-569	48
Exhibit I	April 6, 1982 letter	ID00563	51
Exhibit J	April 9, 1982 letter	ID00562	52
Exhibit K	Materials from the Corps' files re the 1980 Permit Application and related matters	LTVC010416-828	58
Exhibit L	Materials from the files of the Corps related to permit application 84-3937	Dep. Ex. 31 (ID0829-965)	61
Exhibit M	1993 Permit together with material from the Corps' files on the 1993 Permit and the Lost Tree's application for it	ID01623-1708	67

Exhibit N	April 30, 1986 Appraisal entitled "John's Island Remaining Real Estate and Related Assets"	LTVC0013483-557	74
Exhibit O	Map from Dep. Ex. 13	LTVC0S003	79
Exhibit P	Public Notice dated September 9, 1997 issued by the Corps for the Plat 54 permit application	LTVC003280-3291	90
Exhibit Q	Section 404 permit the Corps issued for the fill of wetlands on Plat 54	Dep. Ex. 24 (ID01093-1138)	93
Exhibit R	Cost development estimate by Mr. Melchiori for Plat 57	LTVC003512	106
Exhibit S	Plat 57 Permit Application	Dep. Ex. 9 (ID00005-49)	111

Exhibit T	Court's February 23, 2004 final judgment and opinion in Stubbs litigation	LTVC004556-69	116
Exhibit U	Plat 57 Decision Document	Dep. Ex. 32 (LTVC014016-56)	95
Exhibit V	Promotional sales literature prepared by Lost Tree and labeled "John's Island"	Dep. Ex. 5 (LTVC001311-82)	127
Exhibit W	Town of Indian River Shores zoning map	No Bates	158
Exhibit X	Record of the minutes of the March 26, 1987 meeting of the Board of Directors of Lost Tree	LTVC020026-29	160

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Exhibit Y	Record of the minutes of the September 4, 1985 meeting of the Board of Directors of Lost Tree	LTVC019885-93	161
Exhibit Z	Facsimile from Mark Gronceski, St. John's Water Management District to Stephen Melchiori, dated 7/13/98	LTVC003006-8	162

Appendix A

Stipulation Exhibits A through S and V through Z are omitted.

Stipulation Exhibit T is attached behind this page.

Stipulation Exhibit U is included in the Appendix to the Petition for a Writ of Certiorari at 159a – 211a.

Appendix A

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

CASE NO. 2002-0755-CA17

KING STUBBS and DACE BROWN STUBBS,
husband and wife,

Plaintiffs,

v.

TOWN OF INDIAN RIVER SHORES
and LOST TREE VILLAGE CORPORATION,

Defendants.

FINAL JUDGMENT

THIS CAUSE, came before the Court for a three (3) day non-jury trial from August 20, 2003 through August 22. 2003. The Court also received oral argument on the Writ of Certiorari on September 9, 2003. The Court having heard the testimony, considered the evidence admitted during the proceedings, and having heard argument of counsel, finds and decides as follows:

Statement Of The Case

Plaintiffs filed their initial Complaint on November 25, 2002, to have an approval of a Plat in the Town of Indian

River Shores ("the Town") declared invalid. Plaintiffs served the Town with their Complaint on December 12, 2002, after which Lost Tree Village Corporation ("Lost Tree") was permitted to intervene as a full party defendant. Plaintiffs filed an Amended Complaint on December 17, 2002, which contained three counts.

Count I is an action for injunctive and declaratory relief under Section 163.3215, Florida Statutes (Local Government Comprehensive Planning and Land Development Regulation Act), and alleges that a preliminary plat, conditional use and wetland impacts application approved by the Town is inconsistent with its Comprehensive Plan. It is alleged that the Town incorrectly determined that the wetlands within the portion Lost Tree sought to fill, shown within the "Limits of Fill" on the approved Plat were "marginal wetlands" as set forth in the Comprehensive Plan. Count II is an action for recission of the Plat approval, alleging that the Town's granting of the approval of the Plat amounts to "Contract Zoning." Count III is a Petition for Writ of Certiorari based solely upon the record before the Town Council at the time of the approval of the Plat. At issue in the Certiorari proceedings are issues concerning the Town's Land Development ("Code"), including the physical and biological functions of the wetlands.

Defendant made a Motion for Involuntary Dismissal on Counts I &II of the Plaintiffs' Amended Complaint at the conclusion of Plaintiffs' case In chief. The Court reserved ruling on the motion at that time in favor of hearing and considering all of the evidence in the case. The Motion for Involuntary Dismissal on Counts I & II

is denied and the Court will rule on the merits based on all of the evidence admitted during trial.

Findings Of Fact

On May 16, 1990, the Town adopted its Comprehensive Plan pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act. Lost Tree is the owner of real property along the Indian River Lagoon ("Lagoon") located in the John's Island community in the Town, consisting of a total of 4.99 acres. The property consists of approximately .4 acres of upland mounds, approximately 3.2 acres of wetlands, and approximately 1.4 acres of privately owned submerged lands. Plaintiffs home is located directly across Chambers Cove from the property. Plaintiffs purchased their property for the privacy and seclusion. They positioned their home to look over Chambers Cove and did not expect any homes would be developed directly across from theirs. However, Plaintiffs never made an inquiry as to what the property would be used for prior to purchasing their property.

On August 2, 2002, Lost Tree filed an application in letter form to the Town requesting approval for a preliminary plat ("Plat 57"), wetlands determination, and conditional use ("Approval"). As part of the Approval, Lost Tree sought to fill 2.13 acres of wetlands for one single-family home site.

Before determining whether to grant the Approval, the Town held two public meetings. The first public

meeting was held on October 14, 2002, before the Town's Planning, Zoning and Variance Board ("P&Z"). Lost Tree represented at that meeting that the lot being platted was 4.99 acres. Of the 4.99 acres, approximately 1.4 acres were submerged lands, 32 acres were wetlands, and .4 acres were upland mounds. There was a one acre buffer between the submerged lands and the limits of the upland part of the lot, with the entire upland area of the lot being approximately 2.52 acres. Within the 2.52 acres were numerous upland mounds totaling approximately .4 acres. The total wetland impact was approximately 2.13 acres.

As a result of the impact of the project, Lost Tree was proposing four items of mitigation. The first, was a storm water easement to the Town to continue or to allow the discharge of the storm water into the McCuller's Point impoundment. The second was to reinstall the Town's discharge pipe, increasing the size from 18" to 36"-42", which ever would be appropriate to allow the proper discharge into the impoundment area. The third was to repair a "bleeder" currently in the weir structure in that outfall. This would require blocking the weir to allow the discharge to go into the impoundment area and to eliminate most of the discharge that would be going into the Indian River. The fourth was to allow the implementation of a rim management plan for the mosquito impoundment area at McCuller's Point.

Lost Tree presented its ecological consultant from BKI, Andy Conklin, who advised P&Z that a study had been done on the lot and the results indicated that the outer perimeter of the site (approximately 30 feet in width)

would be higher quality wetlands. Landward of that 30 feet would be marginal wetlands.

The Town's consultant, Bill Musser (licensed professional engineer), advised P&Z that he agreed with Mr. Conklin on a majority of the issues except that his results did not come up with a defined line in the sand regarding marginal wetlands that were within the 30 foot wide buffer around the property. He stated that portions of the "Limits of Fill" on proposed Plat 57 were encroaching into non-marginal wetlands in close proximity to the Lagoon. Mr. Musser went on to add that the Town had allowed development of wetlands like this previously, even though the staff had not called those wetlands marginal. Mr. Musser advised P&Z that he supported the mitigation proposal and that it would benefit the Town and the public. He suggested that if the impacts were allowed, that the Town require the lawsuits associated with the storm water discharge be dismissed as part of the mitigation and that any restoration of wetlands include a conservation easement. There was discussion whether to require a delineation of the marginal wetlands, but that was not accepted.

At that time P&Z voted unanimously to recommend to the Town Council approval of one lot on one acre of fill which included upland and wetlands on the property. P&Z also recommended mitigation to include the storm water easement into McCuller's Point, the discharge pipe, the blocking of the weir, the McCuller's Point conservation and rim plan, no more filling of marginal or non-marginal wetlands owned by Lost Tree, and dismissal of the litigation involving McCuller's Point. The approval was

also subject to St. John's RiverWater Management District ("St. John's") and the Army Corp. of Engineer permits and approvals.

The Town then held a second public hearing on October 24, 2002, before the Town Council to consider the proposed Plat 57. At the hearing, Lost Tree proposed filling 2.13 acres with a one-acre buffer around the outermost edge of the wetlands. The proposed mitigation was to grant the Town permission to dump its storm water onto Lost Tree's land at McCuller's Point, to fix the Town's storm water system by increasing the size of the out falls, to place a conservation easement over about 100 acres of McCuller's Point, to place three mangrove islands inside of John's Island Sound into conservation, the assignment of enforcement of conservation rights to St. Johns regarding two areas of Gem Island on/and previously sold by Lost Tree, to clear the perimeter of McCuller's Point, and to restore another area of wetlands. A representative of St. John's advised the Town Council that its agency staff was recommending approval to its governing board of the propped fill of 2.13 acres on Plat 57 based upon the mitigation plan that would produce a greater long-term ecological value than the wetlands to be impacted.

The same expert opinions with all the supporting scientific data on the issue of marginal vs. non-marginal designation of wetlands that were presented to P&Z were also presented to the Town Council. Lost Tree's consultant called the fill area a marginal wetland and the Town's consultant stated that portions of the fill area were encroaching into non-marginal wetlands in close proximity

to the Lagoon. It was brought out that the Town Council had previously allowed permission to develop wetlands similar to this even though staff had opined that the wetlands to be impacted were non-marginal. The Town Council also heard from Plaintiffs' Council and several other neighbors asking the Town Council to deny the proposed Plat 57.

At the conclusion of all of the testimony presented, the Town Council voted 3 to 2 to grant Lost Tree the Approvals for Plat 57 with an addition to the proposed mitigation of an additional lot in John's Island to be placed into conservation and dismissal of the litigation regarding McCuller's Point. As a result of the Town Council's decision, the Plaintiffs filed this suit.

Conclusions of Law

The first issue to address is the Plaintiffs' claim that the Town failed to follow its Comprehensive Plan. Section 163.3215, Florida Statutes, sets forth the requirements for an "aggrieved or adversely affected party" to appeal and challenge the consistency of a development order with a comprehensive plan that has been adopted by a local government. The first requirement is for the Plaintiffs to meet the definition of an "aggrieved or adversely affected party." Section 163.3215(2), Florida Statutes, defines it as follows:

> As used in this section, the term "aggrieved or adversely affected party" means any person or local government that will suffer an adverse

> effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities or development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.

Plaintiffs claim that they are "aggrieved or adversely affected parties" because of changes to density and intensity of use, compromised view, and changes to the ecosystem. Plat 57 contains approximately .4 acres of upland mounds, approximately 3.2 acres of wetlands, and approximately 1.4 acres of privately owned submerged lands. This is approximately 5 total acres. The property has a comprehensive land use designation of low density residential that would allow for up to three residential units per acre on uplands. A density of one residential unit is permitted on every 1/3 acre of property. As the property contains over 1/3 acres of upland mounds, the property is entitled to at least on residential unit, without consideration of marginal wetlands. The Comprehensive Plan also provided that marginal wetlands have a density of one residential unit per acre. The property, as approved, allows for just one residential home site. This home site is

the same density allowed for the portion of the property that is upland and is the same use allowed as on the upland portion of the property. This is also the same density and use allowed on the marginal wetlands.

The evidence has established that the Town's Approvals did not alter the density or the intensity of use. The alleged impacts to property not owned by the Plaintiffs and changes to an ecosystem impact the Plaintiffs the same as that of the community as a whole. The only interest of the Plaintiffs which potentially exceeds that of the general community is the compromised view, which is an interest that would not be protected or furthered by the Town's Plan. Therefore, the Court finds that the Plaintiffs lack standing to bring a claim pursuant to Section 163.3215, Florida Statutes.

Even if, for arguments sake, we were to assume that the Plaintiffs did have standing, they would be required to present competent evidence that the Approval of Plat 57 by the Town violated the Comprehensive Plan. The pertinent portions of the Town's Comprehensive Plan which regulate land development involving environmentally sensitive lands like Plat 57 are as follows:

> A maximum density of one (1) unit per five (5) acres for wetlands excepting marginal wetlands which shall have a density of one (1) unit per acre...and development regulations shall include provisions for protecting wetlands…no environmentally sensitive wetlands, excepting marginal wetlands…shall be developed for any

> purpose other than open space and passive recreation… these areas…shall be considered and mapped during the development review process in order to assure technically sound assessment of wetland boundariess transition zones, and uplands as defined in the Town wetland protection ordinance.

Plaintiffs argue that the Approval of Plat 57 is inconsistent with the Comprehensive Plan because, it permits the filling of wetlands that are not "marginal as set forth in the Comprehensive Plan. The Comprehensive Plan, in referencing "marginal wetlands," specifically refers to the physical and biological functions of the wetlands. The Court received testimony from various experts on this subject at trial and has reviewed the reports introduced into evidence. The Court finds that the evidence presented at trial has established that the wetlands within the limits of fill on Plat 57 are marginal, based upon the applicable physical and biological functions of wetlands. In addition, the Plaintiffs argue further that Lost Tree failed to map the wetlands during the development review process as requested by the Town's consultants in violation of the Comprehensive Plan. This argument is disingenuous as the evidence has established that from the original Drawings submitted on Plat 57, Lost Tree has taken the position that all the wetlands within the "Limits of Fill" were marginal wetlands. This was verified at both public hearings by Lost Tree's consultant. Therefore, the mapping of the marginal wetlands within the limits of fill would not have provided any additional information to the Town Council to assist

in the development review process. The Court finds that the granting of approvals for preliminary Plat 57, wetlands determination, and conditional use to Lost Tree by the Town were consistent with the Town's Comprehensive Plan.

The second issue to address is the Plaintiffs' claim that the Town engaged in "contract zoning" when it approved Plat 57. The zoning prior to the Approval was low-density residential and the zoning after the Approval was still low-density residential. Therefore, there was no change in the zoning requirements by the Town. The Town only approved a preliminary plat, wetlands impact and conditional use for Plat 57. The Plaintiffs claim that the Town's condition imposed at the public hearings, requiring Lost Tree to dismiss its lawsuit regarding the alleged improper draining of storm water, was tantamount to "contract zoning." The Court finds that the Plaintiffs' claim is without merit. The Approvals for Plat 57 merely rendered the lawsuit between the Town and Lost Tree moot because the mitigation included Lost Tree providing an easement to allow storm water drainage onto McCuller's Point. The mitigation proposal on this point was not a part of a settlement, but was a separate mitigation for the Approval of Plat 57. It was the Town's consultant who recommended that the condition of dismissal of the lawsuit be included. The Town Council then made the dismissal a condition at the public hearing. There was no evidence of a pre-arranged agreement between Lost Tree and the Town Council which would have made the two Town public hearings a sham. The Plaintiffs are asking the Court to expand the concept of "contract zoning" to fit the facts of this case without any legal support, something the Court

is unwilling to do. Therefore, the Court finds that the granting of the approval for preliminary Plat 57, wetlands determination, and conditional use granted to Lost Tree by the Town and accepting the proposed mitigation as well as the additional conditions of mitigation was not tantamount to "Contract Zoning."

The third issue to address is the Petition for Writ of Certiorari seeking appellate review of the decision by the Town Council to grant a preliminary plat, conditional use and wetland impacts application. In an Order dated April 14, 2003 the Court determined that in the interest of judicial economy and efficiency and under the direction of Administrative Order 91-2, the appellate matters raised in this case would be handled in the Court where the *de novo* lawsuit involving the same or similar issues were pending. The common law writ of certiorari is a special mechanism whereby an upper-court can direct a lower tribunal to send up the record of a pending case so that the upper court can "be informed of" events below and evaluate the proceedings for regularity. The writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists. *Broward County v. G.B.V. International Ltd.*, 787 So.2d 838 (Fla. 2001).

The decisions of local government agencies acting in a quasi-judicial capacity are reviewable by certiorari. The Court's function is simply to determine from the record (1) whether procedural due process was accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative decision is supported

by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982). The Court shall address each requirement below:

(1) Whether procedural due process was accorded by the Town Council. The record clearly demonstrates that the Town duly noticed the public hearing, held a quasi-judicial public hearing, and afforded the opportunity for all interested parties to be heard. The Plaintiffs were represented by counsel at the October 24.2002 Town Council meeting. Plaintiffs' counsel spoke on their behalf at the meeting and was given a full opportunity to participate on behalf of the Plaintiffs. It is difficult to understand the Plaintiffs argument on the issue of whether procedural due process was accorded. It appears that they are alleging that the Town Council entered into an agreement with Lost Tree before the hearing to trade off its police power to deny the Approval for Plat 57 in return for the dismissal of pending litigation filed by Lost Tree regarding the Town's storm water drainage. Plaintiffs further allege that as a result of this prior agreement, the public hearing was a sham denying the Plaintiffs procedural due process. There has been no evidence presented to support the claim that members of the Town Council entered into any agreements with Lost Tree before the public hearing. The Court finds that Plaintiffs' argument has no merit.

(2) The approval of Plat 57 was not a departure from the essential requirements of law. The question of whether the essential requirements of law have been met can be re-stated as whether the Town applied the correct law.

Florida Power & Light Co. v. City of Dania, 761 So.2d 1089, 1091 (Fla. 2000)(essential requirements of law and application of correct law are one and the same). Additionally, a departure from the essential requirements of law must be serious enough to result in a miscarriage of justice by depriving the petitioner of his day in court or by having the effect of foreclosing future legal proceedings against the same party due to future injury. *Id.* at 531; *Police Pension Board v. Neilson*, 435 So.2d 325, 326 (Fla. 4th DCA 1983)(essential requirements of the law must be material fundamental errors in applying the law which requires more than a demonstration of mere error).

Plaintiffs argue that Plat 57 violates the essential requirements of law because it is inconsistent with the Town's Comprehensive Plan. This is incorrect because the Town Council found in favor of Lost Tree that the "Limits of Fill" were marginal wetlands which would make development of Plat 57 consistent with the Town's Comprehensive Plan. Plaintiffs further claim that the Town departed from the essential requirements of law by engaging in "contract zoning" when it decided to approve Plat 57. The Court has already found that "contract zoning" is not applicable in this case for the reasons set forth above which would also be applicable to this argument. Finally, the Plaintiffs claimed at oral argument that the Town failed to meet essential requirements of its own law by failing to require compliance with mapping of the marginal wetlands. As explained previously, it was Lost Tree's position from the start, which was conveyed during both public hearings, that the "Limits of Fill" within Plat 57 as drawn were all marginal wetlands. Therefore, a

specific mapping of the marginal wetlands within Plat 57 would not have provided any more information the than drawing submitted with Plat 57. The Court finds that the Approvals for Plat 57 were not a departure from the essential requirements of law. The Town Council properly applied its Land Development Regulations which was the correct law for this application.

(3) The Town Council's decision was supported by competent substantial evidence, The Town Council received testimony from Lost Tree representatives and consultants, its own consultants, and a representative of St. John's. The Town Council also had the benefit of various written documents and drawings presented by the various consultants. The Town Council heard from members of the public including the Plaintiffs' counsel. The major issue to be resolved by the Town Council at the public hearing was whether the Plat 57 area of fill was marginal or non-marginal wetlands. A review of the record has established to the satisfaction of the Court that the Town Council's decision to approve Plat 57 because the area of fill were marginal wetlands was supported by competent substantial evidence. Based upon the foregoing, it is therefore,

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Involuntary Dismissal on Counts I and II is hereby denied.

2. Judgment is entered in favor of Defendants, Town of Indian River Shores and Lost Tree Village Corporation,

and against Plaintiffs, King Stubbs and Dace Brown Stubbs on Counts I and II of the Amended Complaint. King Stubbs and Dace Brown Stubbs shall take nothing and Defendants, Town of Indian River Shores and Lost Tree Village Corporation, shall go hence without delay, as to Counts I and II of the Amended Complaint.

3. The Town of Indian River Shores' approval of Plat 57 is affirmed and the Petition for Writ of Certiorari requested in Count III of the Amended Complaint Is denied.

4. The Court retains jurisdiction so determine entitlement to and amount of any attorney fees and costs.

DONE AND ORDERED in Chambers at Vero Beach, Indian River County, Florida this 23 day of February, 2004.

/s/_____
ROBERT A. HAWLEY
Circuit Court Judge

APPENDIX B — TRANSCRIPT OF THE UNITED STATES COURT OF FEDERAL CLAIMS, DATED APRIL 5, 2011, APRIL 11, 2011 AND APRIL 13, 2011

[286]IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Docket No.: 08-117L

LOST TREE VILLAGE CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Room 5
National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Tuesday, April 5, 2011

The parties met, pursuant to notice of the Court, at 9:32 a.m.

BEFORE: HONORABLE CHARLES F. LETTOW
Judge

* * *

[408]Q Thank you. All right. Let's change gears a little bit here. Put that one aside. I'd like to talk about for awhile the process for platting land in Indian River County, okay?

A Uh-huh.

Q Are you familiar with that process?

A Yes, I am.

Q And how is that you're familiar with that process?

A During my career, I probably have been involved with the approval of 40 plats in Indian River County, at least.

Q Okay. Do you have experience in obtaining preliminary plats?

A Yes, I do.

Q Okay. Does that experience go beyond – in other words, is some of that experience other than in connection with your work for Lost Tree?

[409]A Yes.

Q Okay. And is that also true for the final plat?

A Yes.

Q What is involved in obtaining a preliminary plat from the -- well, which jurisdiction for land that's in the John's -- for land that is covered by the option agreement, which jurisdiction approves the preliminary plat?

A Well, because there is property in the option agreement that's in the county -- some was in the city, but primarily it was in Indian River Shores. the process in Indian River Shores is basically you draw a plan of what you're proposing to plat. You typically would show the stormwater, utility plans, et cetera, and submit these drawings to -- in Indian River Shores, it was the building official that handled it, and they typically will use an outside consultant, engineer, that would review these plans, and once they met their ordinances and codes, it would then go to the planning board, which at a public hearing would approve your preliminary plat. And it would go to the city council, and they would approve the preliminary plat.

Q Okay. What happens at the council –

A Yes.

[410]Q Are you done?

A Yes.

Q What typically would happen on a particular parcel after the council approves the preliminary plat?

A You got preliminary plat approval. You basically were responsible -- you would go get -- if it needed additional permits, be it DEP permits for water and sewer, and other -- the permits that were required. Then you would typically go do the work associated with that plan, put in the infrastructure, build the roads, the sewer, water lines, et cetera, et cetera.

Once that was completed, you would prepare the final plat, submit that back to the building official. Usually the building official and the city attorney would review it. The building official would confirm that the work had been done. The attorney typically would review it for compliance with the local laws relative to the dedication, title, certification, et cetera.

Once that is done, it then goes back to the city council for final approval. Once they approve it at that point in time, they mayor signs it, and you take it, and it is recorded in the public records of [411]Indian River County.

Q Is the final approval by the council that you just mentioned, is that a substantive review?

A Typically, all they're looking for is did it basically -- was it what they approved with the preliminary plan. For the most part, final plats were more rubber-stamped because they already approved it. Now, you just simply went and did the work, did the improvements, and came back for approval to actually record it so that you can begin to sell the property.

Q Okay. What is required under Florida state law for a final plat to be recorded?

A Well, typically you either have to have the work completed, or various municipalities will allow you to bond the improvements. Some require certain infrastructure to be completed. But Indian River Shores, as I recall at this time, you could post a bond for -- generally, I think it was 115 percent of the engineer's estimate for the cost of the improvement; post that bond, and you could record the plat prior to having the work completed.

Q And when you say at this time, what time are you referring to?

A Well, you could typically get final -- you could get preliminary plat approval. You could [412]prepare the final plat, submit the final plat along with an engineer's estimate for the work that was required by that plat, and you could record the plat at that time prior to having any of the infrastructure putting in the ground.

Q If you had a bond.

A If you posted a bond for the improvements.

Q And was that true in the 1980s?

A Yes, although I don't recall ever doing that in Indian River Shores. We typically would do the improvements, and then once they were done, come back and do that. But, yes, that procedure was permitable, allowable, I should say.

Q And in the 1990s -- I mean, has that ever changed?

A That's correct. Not to my knowledge.

* * *

[432]Q Here is another one that we have here. This is Plaintiff's 70. Okay. I have handed you what has been marked as Plaintiff's Exhibit 70, Mr. Melchiori. What is that?

A A copy of the reported John's Island Plat 33.

Q Okay. And you are familiar with this?

A Yes.

Q Okay. Take a look at the map, or the plat [433]map. Is it referred to as a plat map?

A Yes, a plat map.

Q Okay. And what does this plat encompass?

A It encompasses five lots, as well as various tracts.

Q Okay. It looks like Tracts A through L?

A Yes.

Q Do any of those tracts -- well, where is this located?

Appendix B

A This plat is located between Plat 40, Stingaree Point, where the access road, Coconut Palm Road, or Sago Palm Road coming in, and connecting it to what was Plat 25, 26, and 29.

It is a little entrance road really that gets you from the main gate to the first platted section of the island.

Q And I noticed Chambers Cove here to the south of the plat?

A That is correct.

Q So what is on the other side of Chambers Cove from this? Well, I guess it is shown here, John's Island, Plat 40, it says?

A Yes. Actually, where Plat 40 is written on this map, at the time was Plat 40, or the unplatted portion, but that is probably Plat 55, the one [434]recorded at the time.

Q Okay. So, Plat 40 would be to the east?

A Yes, and probably a little bit further to the south as well.

Q Okay. But in any event, this was across -- would it be fair to say that this was across Chambers Cove from Plat 40?

A Yes.

Q Okay. Do any of these tracts, these numerous tracts on Plat 33, contain wetlands?

A Tracts C, D, E, G, H, I, J, K, L, they all contain wetlands. A and B do not. The rest of them probably would all contain wetlands.

Q And how do you know that?

A I am just familiar with the property.

Q And are any of those wetlands subject to conservation easements?

A No.

Q All right. Now, if you turn to the dedication page of this plat. Do you have the big copy?

A Yes.

Q Under dedication and then reservation, if you look at the third paragraph there. Let me save your eyes and I will read that into the record if it [435]is okay. Lost Tree Village Corporation expressly reserves -- do you see that?

A Yes.

Q And continuing, expressly reserves Tracts C, D, E, F, G, H, I, J, K, and L, to itself, its successors, and assigns the right to a future conveyance of all or some of the tracts to the John's Island Property Owners Association, Inc.,

as common areas, or in the alternative, Lost Tree Village Corporation may convey all or some of the tracts to the owners of lots adjacent to these tracts. Do you see that?

A Yes.

Q What does that mean? What meaning is that intended to convey?

A Basically, the owner of the plat reserves the right to do those things. He could give them to the owners. He could give them Jipoa. In the case of this plat, Tract G went with Lot 1, and Tract H was sold to Lot 2, or deeded to Lot 2.

J, K, and L went to the abutting properties. A portion of Tract C was sold to Lot 5. Tract A, I believe, went to Jipoa; and Tract B, I believe, went to the adjacent property owner.

Q And were the transfers of those tracts to [436]the adjacent property owners, was that done at the time that the lots were sold?

A I would assume so. I have not looked at the deeds, but I would suspect that if you looked at the deeds for Lots 1, 2, and 3, that they also would have included not only the lot, but that tract, and they would have been conveyed at the same time.

Q Okay. But putting the timing aside, you do know that they had been deeded?

A Yes.

THE COURT: Can I ask a question?

MR. ANDREWS: Sure.

THE COURT: It looks like from the plat that Lots 1 and 2 are split by Sago Palm Road?

THE WITNESS: That's correct.

THE COURT: I seem to remember some landscaped area across, or a relatively small one, but noticeable, on the opposite side from some houses as we were touring the property.

THE WITNESS: Yes.

THE COURT: Is that really what this is all about?

THE WITNESS: Yes. Actually, you could see where it says that there is a 10 foot common access easement for Lots 1 and 2. There is actually a dock [437]constructed into the canal, but those owners of Lots 1 and 2 do maintain them. They mow the grass and it is all nice and manicured, and everything, on that side of the street.

BY MR. STOUCK:

Q Now, who owns Tract I here?

A Lost Tree Village.

Q It still owns it?

A That's correct.

Q And it contains wetlands?

A That's correct.

Q Now, are any of the wetlands that are depicted, are any of the wetlands that are located on the tracts that you identified as containing wetlands on this map subject to conservation easements?

A No, none of them are.

Q Okay. This is Plaintiff's 52. I have handed you what has been marked as Plaintiff's Exhibit 52, Mr. Melchiori. Do you recognize that?

A I do. It is John's Island Plat 41.

Q Okay. We have here again a designation of some unplatted land. Do you see that?

A Yes.

Q And what is the significance of that designation?

[438]A The unplatted designations are both on the north and south sides of Tract A. It is just simply delineating land that was never platted.

Q And what is depicted on this map?

A The purpose of this plat was really to plat the right-of-way for Sandpiper Causeway so that it could ultimately be turned over to the Property Owners Association. So it included Tract A, which was really the roadway, and then two other small pieces, which was Tracts B and C.

Q Okay. Do any of the tracts that are indicated on this plat include wetlands?

A Certainly Tract C has got some wetlands in it, and actually Tract A has a little bit of wetland in it. Possibly Tract B in the one corner.

Q And how do you know that?

A I am just familiar with the property.

Q And you have observed the wetlands?

A Yes.

Q And are any of those wetlands subject to conservation easements?

A Not of this platted, no.

THE COURT: I have another hypertechnical question, Mr. Andrews.

MR. ANDREWS: Yes, Your Honor.

[439]THE COURT: Who owns the roads?

THE WITNESS: They all got turned over to the Property Owners Association.

THE COURT: When did that occur?

THE WITNESS: At various times when certain plats went on record, and at certain times that they were turned over, but the dedication of most all of them simply will state that it is the Property Owners Association maintenance responsibility, but they were turned over at various times throughout the development of the community.

BY MR. STOUCK:

Q So some of those roads were turned over, for example, on the east of A-1-A in the '70s?

A Yes. I would assume that all -- well, I don't know specifically the dates, but it happened at various times. It didn't all happen at one time. Around the old golf course, or the two golf courses, I am sure those were turned over at one time to one association when they merged.

But it happened during several different transactions, as opposed to one time.

Q Were the roads generally turned over to property owners associations at or about the time the plats near those roads were recorded?

[440]A It varies, but that is typical.

Q Okay. I have handed you what has been marked as Plaintiff's 59.

A Yes.

Q What is this?

A Recorded John's Island Plat 44.

Q And take a look at the plat, please. What is depicted or shown on this plat?

A Residential Lots 113 through 133. There is Tracts A, B, C, and D, E.

Q And there is also some unplatted land to the south there, right?

A That's correct.

Q Do any of the tracts contain wetlands?

A I know that Tracts A, and B are -- well, B, C, and D do. A is a lake. F contains wetlands.

Q And how do you know that?

A Just being familiar with the property. Actually, Tracts B, C, and D, were one of the ponds that was proposed to be filled with the original permit. That general area.

Q And do any of the wetlands depicted on this map, are any of the wetlands subject to a conservation easement?

A No.

[441]Q Okay. And this is Plaintiff's 64. I hand you what has been marked as Plaintiff's Exhibit 64, Mr. Melchiori. What is this?

A This is a copy of the recorded John's Island Plat 47.

Q And if you look at the map, what is included here?

A Lots 1 through 12, and several tracts, Tracts A, B -- wait a minute. No, A, C, E, D.

Q Do any of those tracts contain wetlands?

A Tract D contains some wetlands, but the others do not.

Q And how do you know that?

A I actually did this plat, too. No, I take that back. This one was done at Lloyd and Associates. I did the construction drawings for this at McQueen and Associates.

Q Construction drawings for what?

A For this development.

Q For what part of the development?

A Pardon?

Q What part of the development?

A The roadways, and utilities, and so on.

Q Okay. And does Tract B -- I believe you said Tract B contains wetlands?

[442]A Yes.

Q Was that subject to a conservation easement?

A No.

Q Okay. Thanks. Are you familiar with the conservation easements that Lost Tree created on land that it obtained under the 1968 option agreement?

A Yes.

Q How are you familiar with those conservation easements?

A I was responsible for many of them, and I am certainly familiar with the ones that I was not involved with just during my course of working for Lost Tree Village.

Q Okay. Well, can you -- well, let's see if we can get a list out of the properties from the option agreement that is currently subject to conservation easements.

A There would certainly be the islands, and they were sold to the municipalities, and there were conservation easements on them. There was the Tracts A and B that were associated with Plat 53.

There is Hole In the Wall Island, which was associated with the Horses Head. There is the southern tip of the Horses Head which was part of that Plat 54 project.

[443]There is the two parcels on either side of the causeway, the Sandpiper Causeway that were placed in conservation with the Horses Head project. There is Plat 46, which is the large wetland just to the east of the Gem Island Causeway that was mitigation for the Gem Island Causeway and Bridge.

There is three islands that are out in John's Island Sound off the northeast end of Gem Island that were part of the Horses Heads Project. There is a small island off of the center-east section of Gem Island that Lost Tree deeded to the adjacent property owners that put some restrictions on it and they could not do anything with it.

And there is a wetland island or peninsula off of the northeast corner of Gem Island, and again deeded to the adjacent property owners that had some basic restrictions, some non-development restrictions on them.

Q Okay. Any others? Any other lands from the 1968 option agreement that is currently subject to a conservation easement?

A That's all that I can think of.

* * *

[472]Q All right. Let me start over just so we have it all. It says that the Corps reminded the applicant of previous statements it had made to the Corps during the permit review process for the Horses Head Limited Project (199704991).

The Corps asked for the applicant's total plan of development for John's Island, and specifically questioned whether any other wetland areas within John's Island were being considered as potential development sites, and if so, which areas.

[473]The applicant answered that along with the conservation easements being offered for the Horses Head Limited Project, all wetlands remaining within the development would be placed under a conservation easement, with the exception of inaccessible land, or land that had not yet been surveyed to identify upland areas that could be developed at some future date. Do you see that?

A Yes.

Q All right. Do you recall discussing with the Corps of Engineers staff this question of, or this issue of what additional wetlands might be developed at John's Island?

A No. What I recall is that part of the plat for the Horses Head application, we were required by the St. John's to identify all of the properties that Lost Tree Village owned, both within John's Island and without.

We did that. We looked at various properties, but I do not remember, or I did not make any statement to this effect.

* * *

[539]Q So what's your understanding of why it was done that way rather than including them in the plat?

A When this plat was prepared, we just did the uplands. It seemed like kind of an afterthought. Then, they realized they needed to give the people access through the mangroves, so the metes and bounds descriptions were prepared prior to the lots even being sold, so when you got it, you got the lot as well as there was a separate sketch that went with that lot that gave you that wetland access or access [540]to the water through the wetlands.

Q Okay. And take a look at Plat 33 now. It's No. 70. We've looked at this before.

A Yes.

THE COURT: This is 33?

MR. STOUCK: 33, Your Honor, yes.

THE COURT: Not 53. You want 33?

MR. STOUCK: Yes. Yes, I misspoke before. I'm talking about Plaintiff's Exhibit 70, Plat 33.

BY MR. STOUCK:

Q Do you have that?

A Yes.

Q The tracts there that are shown on the south side, all except I and -- well, the tracts there I believe you testified before contain wetlands, right?

A Yes.

Q And what's the approximate length of these?

A If you look at these, they're 400 feet.

Q Okay.

A Some of them are as much as 400 feet.

Q Now looking at Plaintiff's Exhibit 21, which is the plat map, the little yellow squares, are there other examples in the community of John's Island of lots that may not be apparent from this map but that have an area of wetlands between the lots and whatever [541]water frontage there might be?

A Many of the lots in what they call the oyster cut, which is the Plat 44 area, have similar situations, which is --

Q Okay. Where's Platt 44?

A It would be the northwest section of the island.

MR. STOUCK: Okay. Hold on. Your Honor, one thing I've learned is that the next time we're going to provide those notebooks I think and make it a little easier. I'm sorry we didn't do that.

THE COURT: Well, we'll get there. All right. Thank you. Now, what are we talking about?

THE WITNESS: Plat 44, call it the northwestern section.

THE COURT: Got it.

THE WITNESS: Many of those lots have pretty good-sized mangrove areas that separate the upland, but they were included in the lot.

BY MR. STOUCK:

Q When you say mangrove areas, how does that --

A Like wetland areas that are included in the lot that gets you from the upland to the water.

Q Okay.

[542]A The actual property line is out in the water. It's on submerged lands that Lost Tree owned. Many of the lots in what's Plat 49, that would be along this little cove, those would also, particularly ones at the end of the cove, had wetland areas that were included in the lot.

* * *

[544]Q What is the town lot?

A Plat 31, it's Lot 107, which is immediately west of the cemetery. If you look at this plan, you could see the cemetery property entailed, and it had [545]actually a flag access to the river, that was property that was owned by the town, and when that section of the island, Plat 31, was developed, the cemetery was greatly reduced. In fact, it's just the one acre in the upper left corner of that property, so what Lost Tree Village did was they limited the cemetery, and they gave the town a lot in order for the town in fact to relinquish the property that's depicted on this plan, so that was part of the development plan for Plat 31 is the town got the lot, and they relinquished, they gave up the property, and limited the cemetery to one acre.

THE COURT: Where is this on the colored map?

THE WITNESS: If you look at the colored map, this pink area here.

THE COURT: Got you.

THE WITNESS: And there's a flag section of it that got access to the river. That was owned by the town, and that was the cemetery. It was for the cemetery, the expansion of it, and if you look very closely at it, in the corner where the flag is, there's just a small one-acre piece. That's ultimately what became the cemetery.

In order for the town to release the rest of [546]the property, Lost Tree gave them lot 107, which was the lot immediately to the west of the cemetery on the river, and they might have even gotten a lake lot for it as well, but they got some lot. They got at least a lot in order to release the property around the cemetery.

BY MR. STOUCK:

Q Did the town lot contain wetlands?

A Yes, it did.

Q Has it been built upon?

A Yes, it did.

Q Did the building upon the town lot require a Section 404 permit?

A Yes, it did.

Q Did the town apply to the Corps for the Section 404 permit?

A The application was originally submitted by an owner, and then the town actually picked up the application and finished it, yes.

Q And the Corps granted that Section 404 application?

A Yes, they did.

Q When was that?

A That probably was late '80s. I'm sorry.

Late '90s I mean. Probably '99 maybe 2000. Somewhere [547]around 2000.

Q Did you have any involvement in that application?

A When the town got it back, there was an individual that was trying to get the permit. He had a contract on the lot. He walked away from it, and the town asked me to help them kind of finalize the permit, and I did a little work for them on it outside of my responsibilities with Lost Tree, and that was it.

Q And that was a wetlands fill permit?

A Yes.

* * * *

Appendix B

[793]IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Docket No.: 08-117L

LOST TREE VILLAGE CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Courtroom 106
U.S. Federal Courthouse
300 South 6th Street
Fort Pierce, Florida
Monday, April 11, 2011

The parties met, pursuant to notice of the Court, at 9:00 a.m.

BEFORE: HONORABLE CHARLES F. LETTOW
Judge

* * *

[935]Q All right. Now, to your knowledge, other than the -- well, when you were discussing the Plat 54 [936] permit application, you discussed a conversation that you had with Mr. Melchiori. Do you recall that?

A Yes.

Q And I believe your testimony was to the effect that Mr. Melchiori -- at that time, Mr. Melchiori was acting on behalf of the applicant?

A Yes.

Q And Mr. Melchiori indicated to you, I believe was your testimony, that Lost Tree subsequently would not develop any wetlands in the community of John's Islands other than the wetlands that had not been surveyed; is that right?

A No, he indicated that no other wetlands -- that all wetlands on John's Island were going to be placed in a conservation easement, but for parcels that were inaccessible, or that they had not surveyed to see if there were developable uplands.

* * * *

Appendix B

[1239]IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Docket No.: 08-117L

LOST TREE VILLAGE CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Courtroom 106
U.S. Federal Courthouse
300 South 6th Street
Fort Pierce, Florida
Wednesday, April 13, 2011

The parties met, pursuant to notice of the Court, at 8:16 a.m.

BEFORE: HONORABLE CHARLES F. LETTOW
Judge

* * *

[1379]Q Mr. Melchiori, is there some amount of distance between plat 57 and plat 55?

A Yes.

Q About how much?

A Approximately 320 feet.

Q Okay. And how do you know that?

A I've measured it on the documents, the various plats.

Q Does that 320-foot approximately piece of land contain any usable land?

A No.

Q And why do you say that?

A I've been by the property more times than I can count, walked areas. Just from personal experience and being on the property.

* * * *

APPENDIX C — JOHN'S ISLAND PLAT 57

FOLDOUT

JOHN'S ISLAND PLAT 57

A SUBDIVISION OF LAND IN SECTION 13, TOWNSHIP 32 SOUTH, RANGE 39 EAST, TOWN OF INDIAN RIVER SHORES, INDIAN RIVER COUNTY, FLORIDA

PLAT BOOK_____

PAGE_____

DOCKET NO._____

DEDICATION AND RESERVATION

KNOW ALL MEN BY THESE PRESENTS THAT HORSE'S HEAD LTD, A FLORIDA LIMITED PARTNERSHIP AND GEM ISLAND INVESTMENT, L.P., A FLORIDA LIMITED PARTNERSHIP, OWNERS OF THE LAND SHOWN HEREON, BEING IN SECTION 13, TOWNSHIP 32 SOUTH, RANGE 40 EAST, INDIAN RIVER SHORES, INDIAN RIVER COUNTY, FLORIDA SHOWN HEREON AS JOHN'S ISLAND PLAT 57 HAVE CAUSED THE SAME TO BE SURVEYED AND PLATTED AS SHOWN HEREON AND DO HEREBY DEDICATE AS FOLLOWS:

TO THE TOWN OF INDIAN RIVER SHORES, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF FLORIDA, A PERPETUAL EASEMENT AND LICENSE ON, OVER AND UNDER THE RIGHT-OF-WAYS DESIGNATED HEREON FOR THE SOLE AND EXCLUSIVE PURPOSE OF FURNISHING UTILITIES, POLICE, FIRE, GARBAGE AND OTHER PUBLIC OR PRIVATE UTILITY SERVICES TO THE PROPERTY SHOWN ON THIS PLAT AND ALL OTHER PROPERTIES LOCATED WITHIN SAID TOWN.

THE UNDERSIGNED, DOES HEREBY RESERVE UNTO ITSELF, ITS SUCCESSORS AND ASSIGNS, THE RIGHT TO DEDICATE ALL OF THE STREETS, ALLEYS, ROAD RIGHT-OF-WAYS AND PUBLIC AREAS SHOWN ON THIS PLAT TO THE PUBLIC FOR THE PURPOSES THEREON STATED UPON:

A.?THE CONSENT OF THE GOVERNING BODY OF THE TOWN OF INDIAN RIVER SHORES IF AT THE TIME OF SUCH PUBLIC DEDICATION THE LANDS SHOWN ON THIS PLAT LIE WITHIN THAT MUNICIPALITY, OR IF NOT, THE CONSENT OF THE GOVERNING BODY OF THE AREA WHEREIN SAID LANDS LIE.

B.?THE CONSENT OF THE MAJORITY (TO BE COMPUTED BY AREA) OF THE OWNERS OF THE PROPERTY EMBRACED IN THIS SUBDIVISION.

UNLESS SPECIFICALLY STATED IN THIS DEDICATION, NO STREETS, ALLEYS, EASEMENTS, RIGHT-OF-WAYS, PUBLIC OR RECREATION AREAS SHOWED ON THIS PLAT SHALL BE DEEMED TO HAVE BEEN DEDICATED TO THE PUBLIC.

THE CONSERVATION EASEMENT SHOWN HEREON IS SUBJECT TO THE TERMS AND CONDITIONS AS DESCRIBED IN OFFICIAL RECORD BOOK_____, PAGE_____ OF THE PUBLIC RECORDS OF INDIAN RIVER COUNTY, FLORIDA.

IN WITNESS WHEREOF THE ABOVE NAMED PARTNERSHIP HAS CAUSED THESE PRESENTS TO BE SIGNED BY CHARLES M. BAYER, JR., PRESIDENT, HORSE'S HEAD, INC., GENERAL PARTNER OF HORSE'S HEAD, LTD. AND CHARLES M. BAYER, JR. AND LAURA ZERBOCK, THE PRESIDENT AND VICE PRESIDENT, RESPECTIVELY, OF GEM ISLAND INVESTMENT INC., GENERAL PARTNER OF GEM ISLAND INVESTMENT, LP, A FLORIDA LIMITED PARTNERSHIP, THIS _____ DAY OF _____, 200 .

HORSE'S HEAD, LTD.
A FLORIDA LIMITED PARTNERSHIP

BY: _____??WITNESS: _____
CHARLES M. BAYER, JR., PRESIDENT ???_____
HORSE'S HEAD, INC.
IT'S GENERAL PARTNER

GEM ISLAND INVESTMENT, INC. AS GENERAL PARTNER OF GEM ISLAND INVESTMENT, LP, A FLORIDA LIMITED PARTNERSHIP

BY: _____??WITNESS: _____
CHARLES M. BAYER, JR., PRESIDENT???
BY: _____ ___?? WITNESS: _____
LAURA ZERBOCK, VICE PRESIDENT???? ?_____

ACKNOWLEDGMENT

STATE OF FLORIDA
COUNTY OF INDIAN RIVER

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS _____ DAY OF _____, 200 , BY CHARLES M. BAYER, JR. PRESIDENT, HORSE'S HEAD, INC., GENERAL PARTNER OF HORSE'S HEAD LTD., AND CHARLES M. BAYER, JR. AND LAURA ZERBOCK, PRESIDENT AND VICE PRESIDENT, RESPECTIVELY OF GEM ISLAND INVESTMENT, L.P., ON BEHALF OF SAID PARTNERSHIP.

MY COMMISSION NUMBER IS: _____
MY COMMISSION EXPIRES: _____

_____
NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

THE ABOVE INDIVIDUALS ARE, PERSONALLY KNOWN _____ OR PRODUCED IDENTIFICATION _____, TYPE OF IDENTIFICATION PRODUCED _____

LOCATION MAP

DESCRIPTION – JOHN'S ISLAND PLAT 57

A PARCEL OF LAND LYING IN SECTION 13, TOWNSHIP 32 SOUTH, RANGE 39 EAST, INDIAN RIVER COUNTY, FLORIDA, SAID PARCEL DESCRIBED AS FOLLOWS;

BEGIN AT THE INTERSECTION OF THE NORTHERLY RIGHT OF WAY LINE OF STINGRAY POINT WITH THE EASTERLY LINE OF LOT 1, JOHN'S ISLAND PLAT 40, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 12, PAGE 10, OF THE PUBLIC RECORDS OF INDIAN RIVER COUNTY, FLORIDA; THENCE NORTH 22 DEGREES 17 MINUTES 36 SECONDS WEST, ALONG THE EASTERLY LINE OF SAID LOT 1, A DISTANCE OF 180.85 FEET; THENCE SOUTH 83 DEGREES 18 MINUTES 56 SECONDS WEST, ALONG THE NORTHERLY LINE OF SAID LOT 1, A DISTANCE OF 175.00 FEET; THENCE NORTH 4 DEGREES 30 MINUTES 57 SECONDS EAST, A DISTANCE OF 330.55 FEET; THENCE SOUTH 84 DEGREES 19 MINUTES 24 SECONDS EAST, A DISTANCE OF 613.46 FEET; THENCE SOUTH 20 DEGREES 18 MINUTES 50 SECONDS EAST, A DISTANCE OF 170.29 FEET TO A POINT ON THE AFOREMENTIONED NORTHERLY RIGHT OF WAY LINE OF STINGRAY POINT AND A POINT ON A CURVE, CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 251.57 FEET, A CENTRAL ANGLE OF 17 DEGREES 06 MINUTES 42 SECONDS, AND A CHORD OF 74.85 FEET BEARING SOUTH 61 DEGREES 07 MINUTES 49 SECONDS WEST; THENCE SOUTHWEST ALONG SAID CURVE AND SAID RIGHT OF WAY LINE, A DISTANCE OF 75.13 FEET; THENCE SOUTH 52 DEGREES 34 MINUTES 28 SECONDS WEST, A DISTANCE OF 78.38 FEET TO THE POINT OF CURVATURE OF A REVERSE CURVE, CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 321.00 FEET, A CENTRAL ANGLE OF 5 DEGREES 43 MINUTES 47 SECONDS, AND A CHORD OF 32.09 FEET BEARING SOUTH 55 DEGREES 26 MINUTES 21 SECONDS WEST; THENCE SOUTHWEST ALONG SAID CURVE, A DISTANCE OF 32.10 FEET TO THE POINT OF CURVATURE OF A REVERSE CURVE, CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 529.00 FEET, A CENTRAL ANGLE OF 9 DEGREES 40 MINUTES 30 SECONDS, AND A CHORD OF 89.22 FEET BEARING SOUTH 53 DEGREES 27 MINUTES 59 SECONDS WEST; THENCE SOUTHWEST ALONG SAID CURVE, A DISTANCE OF 89.33 FEET TO THE POINT OF CURVATURE OF A NON-TANGENT CURVE, CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 415.70 FEET, A CENTRAL ANGLE OF 34 DEGREES 48 MINUTES 48 SECONDS, AND A CHORD OF 248.71 FEET BEARING SOUTH 66 DEGREES 02 MINUTES 08 SECONDS WEST; THENCE SOUTHWEST ALONG SAID CURVE, A DISTANCE OF 252.58 FEET TO THE POINT OF BEGINNING;

CERTIFICATE OF RECORDING

STATE OF FLORIDA
COUNTY OF INDIAN RIVER

I, JEFFREY K. BARTON, CLERK OF THE CIRCUIT COURT OF INDIAN RIVER COUNTY, FLORIDA, DO HEREBY CERTIFY THAT I HAVE EXAMINED THE FOREGOING PLAT AND THAT IT COMPLIES WITH ALL REQUIREMENTS OF CHAPTER 177 OF THE LAWS OF THE STATE OF FLORIDA, AND IS FILED FOR RECORD THIS _____ DAY OF _____, 200 , AND RECORDED ON PAGE _____ IN PLAT BOOK _____ IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT OF INDIAN RIVER COUNTY, FLORIDA.

JEFFREY K. BARTON????BY: _____
CLERK OF THE CIRCUIT COURT????DEPUTY CLERK
INDIAN RIVER COUNTY, FLORIDA

EVIDENCE OF APPROVAL

I, _____, AS MAYOR OF THE TOWN OF INDIAN RIVER SHORES, A MUNICIPAL CORPORATION OF THE STATE OF FLORIDA DO HEREBY CERTIFY THAT THIS PLAT HAS BEEN APPROVED BY OFFICIAL ACTION OF ITS GOVERNING BODY, THE TOWN COUNCIL. IN EVIDENCE THEREOF, I HAVE HEREUNTO SET MY HAND AS MAYOR THIS _____ DAY OF _____, 200 .

_____
MAYOR, TOWN OF INDIAN RIVER SHORES

SURVEYORS CERTIFICATE

KNOW ALL MEN BY THESE PRESENTS THAT THE UNDERSIGNED, BEING A STATE OF FLORIDA LICENSED AND REGISTERED PROFESSIONAL SURVEYOR AND MAPPER, DOES HEREBY CERTIFY THAT ON _____, 200 , HE COMPLETED THE SURVEY OF THE LANDS AS SHOWN IN THE FORGOING PLAT; THAT SAID PLAT IS A CORRECT PRESENTATION OF THE LANDS THEREIN DESCRIBED AND PLATTED OR SUBDIVIDED; THAT PERMANENT REFERENCE MONUMENTS HAVE BEEN PLACED AND PERMANENT CONTROL POINTS HAVE BEEN SET AS SHOWN HEREON AS REQUIRED BY CHAPTER 177, FLORIDA STATUTES AND THE TOWN OF INDIAN RIVER SHORES SUBDIVISION AND PLATTING ORDINANCE; AND THAT SAID LAND IS LOCATED IN INDIAN RIVER COUNTY, FLORIDA.

DATE: _____??SIGNED: _____
DAVID M. JONES
PROFESSIONAL SURVEYOR AND MAPPER
LICENSE NUMBER 3909
STATE OF FLORIDA

TITLE CERTIFICATE

I DOUG MAREK, A FLORIDA LICENSED ATTORNEY, DO HEREBY SUBMIT THIS, HIS TITLE OPINION TO THE TOWN OF INDIAN RIVER SHORES TOWN COUNCIL, INDIAN RIVER COUNTY, FLORIDA, THAT APPARENT RECORD TITLE IS HELD BY, HORSE'S HEAD LTD. AND GEM ISLAND INVESTMENT, LP, THE ORGANIZATIONS EXECUTING THE DEDICATION TO THE LAND DESCRIBED AND SHOWN IN THE FOREGOING PLAT OF JOHN'S ISLAND PLAT 54 AND THAT ALL TAXES HAVE BEEN PAID ON SAID PROPERTY IN ACCORDANCE WITH SECTION 197192, FLORIDA STATUTES AND THAT THE OFFICIAL RECORD BOOK AND PAGE NUMBER OF ALL MORTGAGES, LEINS AND ENCUMBRANCES ARE LISTED BELOW:

NONE

BY: _____
DOUG MAREK, FLORIDA BAR NO. 035180

INDIAN RIVER SHORES SURVEYOR'S CERTIFICATE

THIS PLAT OF JOHN'S ISLAND PLAT 57, HAS BEEN REVIEWED BY THE UNDERSIGNED PROFESSIONAL SURVEYOR AND MAPPER EMPLOYED BY THE TOWN OF INDIAN RIVER SHORES, WHO HEREBY CERTIFIES THAT THIS PLAT CONFORMS TO THE REQUIREMENTS OF CHAPTER 177, FLORIDA STATUTES.

_____
FLORIDA REGISTRATION
DATED_____

THIS INSTRUMENT PREPARED BY:

DAVID M. JONES
PROFESSIONAL SURVEYOR & MAPPER
3899 39TH SQUARE
VERO BEACH , FL. 32960
(772)567-9875

TOWN | NOTARY | DEVELOPER | COUNTY CLERK | SURVEYOR | TOWN SURVEYOR

1" = 50'

SHEET 1 OF 2 SHEETS

Plaintiff's Exhibit
118
Lost Tree v. US
08-177C

LTVC020296

Appendix C

FOLDOUT

JOHN'S ISLAND PLAT 57

A SUBDIVISION OF LAND IN SECTION 13, TOWNSHIP 32 SOUTH, RANGE 39 EAST, TOWN OF INDIAN RIVER SHORES, INDIAN RIVER COUNTY, FLORIDA

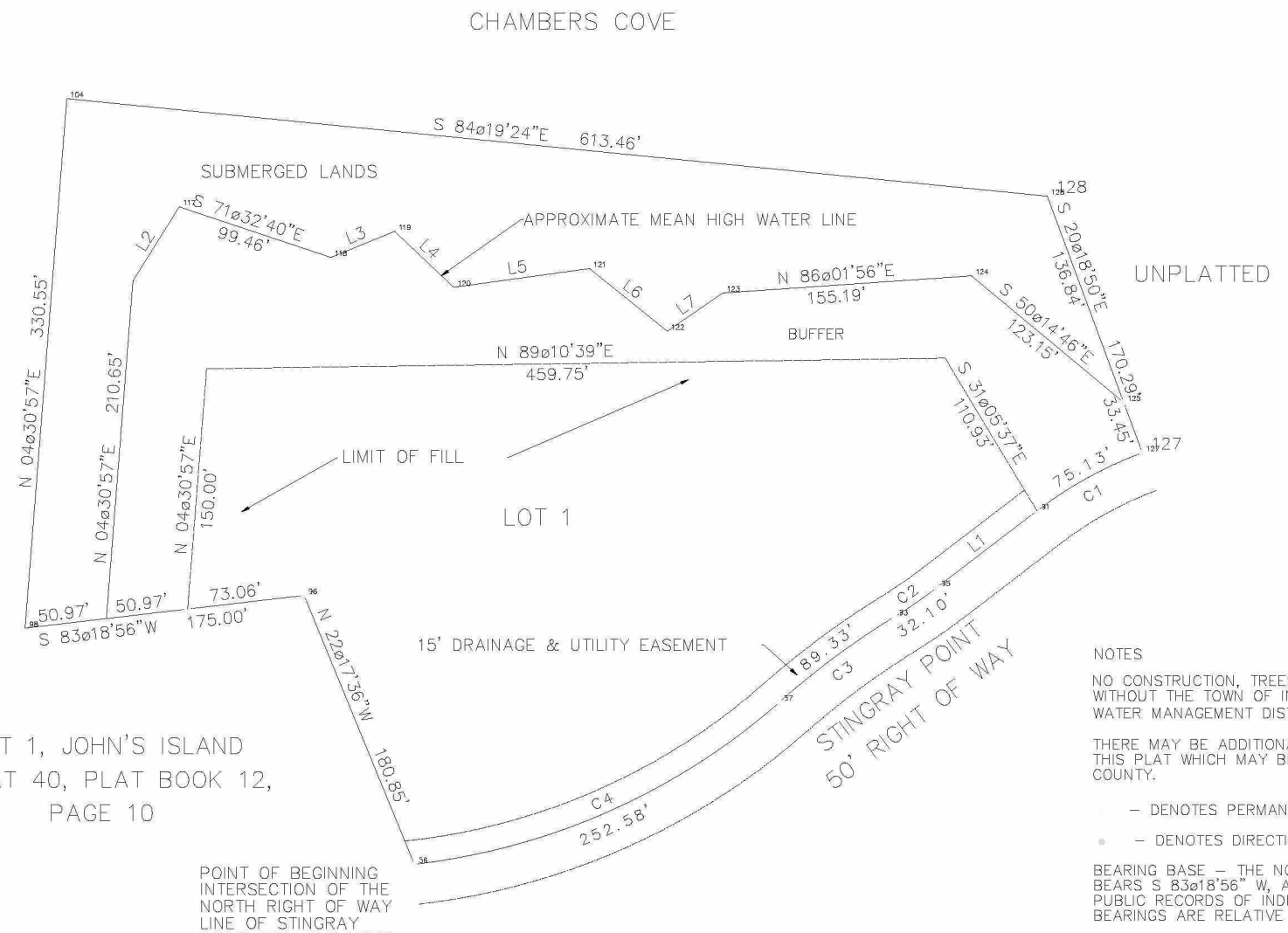
PLAT BOOK_____

PAGE_____

DOCKET NO._____

CURVE	DELTA ANGLE	RADIUS	ARC	TANGENT	CHORD	CHORD BEARING
C 1	17ø06'42"	251.57'	75.13'	37.85'	74.85'	S 61ø07'49"W
C 2	5ø43'47"	321.00'	32.10'	16.06'	32.09'	S 55ø26'21"W
C 3	9ø40'30"	529.00'	89.33'	44.77'	89.22'	S 53ø27'59"W
C 4	34ø48'48"	415.70'	252.58'	130.33'	248.71'	S 66ø02'08"W

LINE	BEARING	DISTANCE
L 1	S 52ø34'28"W	78.38'
L 2	N 31ø59'20"E	54.62'
L 3	N 67ø55'05"E	42.94'
L 4	S 46ø32'51"E	50.61'
L 5	N 82ø07'44"E	85.38'
L 6	S 51ø08'41"E	62.13'
L 7	N 55ø31'15"E	41.87'



1" = 50'

ACREAGE SUMMARY
OVERALL LOT 4.992 ACRES
SUBMERGED LANDS 1.407 ACRES
UPLANDS 2.5183 ACRES

NOTES

NO CONSTRUCTION, TREES OR SHRUBS WILL BE PLACED IN EASEMENTS WITHOUT THE TOWN OF INDIAN RIVER SHORES AND ST. JOHN,S RIVER WATER MANAGEMENT DISTRICT APPROVAL.

THERE MAY BE ADDITIONAL RESTRICTIONS THAT ARE NOT RECORDED ON THIS PLAT WHICH MAY BE FOUND IN THE PUBLIC RECORDS OF THIS COUNTY.

– DENOTES PERMANENT REFERENCE MONUMENT SET WITH 3909 DISK

– DENOTES DIRECTION CHANGE IN BOUNDARY

BEARING BASE – THE NORTH LINE OF LOT 1, JOHN'S ISLAND PLAT 40 BEARS S 83ø18'56" W, AS SHOWN IN PLAT BOOK 12, PAGE 10, OF THE PUBLIC RECORDS OF INDIAN RIVER COUNTY, FLORIDA AND ALL OTHER BEARINGS ARE RELATIVE THERETO.

THIS INSTRUMENT PREPARED BY:

DAVID M. JONES
PROFESSIONAL SURVEYOR & MAPPER
3899 39TH SQUARE
VERO BEACH , FL. 32960
(772)567-9875

REVISIONS	SHEET	OF
	2	2 SHEETS

LTVC020297