No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LOST TREE VILLAGE CORPORATION

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The court of appeals held the United States liable for $4.2 million for a categorical regulatory taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), based on the United States Army Corps of Engineers' denial of a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, to fill wetlands on a 4.99-acre area. The 4.99-acre area was part of a 1300-acre tract that respondent acquired and developed into a gated residential community.

The questions presented are as follows:

1. Whether, in determining the "parcel as a whole" for purposes of regulatory-takings analysis under the Just Compensation Clause, the court of appeals erred by severing regulated wetlands from unregulated, contiguous uplands under common ownership solely because respondent had no expectation of developing those wetlands at the time it developed the rest of the residential community.

2. Whether 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 resulted in a categorical regulatory taking of the residual wetlands tract under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-14a, 15a-29a) are reported at 787 F.3d 1111 and 707 F.3d 1286. The opinions of the Court of Federal Claims (App., *infra*, 30a–60a, 61a–129a, 130a-158a) are reported at 115 Fed. Cl. 219, 100 Fed. Cl. 412, and 92 Fed. Cl. 711.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2015. A petition for rehearing was denied on October 30, 2015 (App., *infra*, 212a-213a). On January 19, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to

and including February 29, 2016. On February 17, 2016, the Chief Justice further extended the time to March 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 218a–228a.

STATEMENT

This case involves a decision by the Federal Circuit finding the United States liable for a categorical regulatory taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). App., *infra*, 1a-2a. The court found that the government had taken a 4.99-acre area because it denied a permit to fill wetlands in that area under Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344. App., *infra*, 1a-3a, 14a. Respondent, a development company, purchased the 4.99-acre area in 1974 as part of its acquisition of 1300 acres of largely contiguous coastal property. Over the ensuing decades, respondent developed the entire area into a gated residential community and sold most of the uplands as individual home sites. *Id.* at 16a. Respondent finally sought to develop some of its residual wetlands holdings, which had been regulated by the CWA since the time of purchase, and it filed this suit alleging a categorical taking when it was denied a permit to fill the 4.99-acre area. *Id.* at 3a-4a.

In defining the relevant parcel on the basis of which to measure the economic impact of the regulation, the court of appeals severed the 4.99-acre area from the rest of the 1300 acres respondent had originally purchased—including a contiguous uplands tract that respondent still owned—on the ground that respondent had no expectation of developing the wetlands when it developed the adjacent uplands. Then, after finding that respondent's lack of any such development expectations justified treating the 4.99-acre area alone as the parcel as a whole, the court refused to consider that same lack of any reasonable, investment-backed expectations in adjudicating whether a categorical taking had occurred. As a result, the court affirmed a $4.2 million award against the government for a per se taking of the 4.99 acres, even though the share of the overall purchase price attributable to that area was $5370. App., *infra*, 14a; C.A. App. A2028 (joint stipulation of facts).

1. Respondent is a corporation that has engaged in various real estate enterprises, including land development and commercial real estate investment. App., *infra*, 63a-64a, 74a. In 1968, respondent entered into an option agreement to purchase land in central Florida on the Atlantic coast. *Id.* at 16a. Between 1969 and 1974, respondent bought that property in six purchases under the option agreement. *Id.* at 16a, 65a. In August 1974, in the last purchase, respondent acquired the Island of John's Island, Gem Island, and other parcels along the Indian River. *Ibid.* Included in that purchase was the 4.99-acre area at issue here, which is located on the Island of John's Island on a small peninsula called Stingaree Point and is now known as Plat 57, although it has never formally been

platted. *Ibid.*; see *id.* at 72a & n.9. "Plat 57 consists of 1.41 acres of submerged lands and 3.58 acres of wetlands with some upland mounds installed by Florida's 'Mosquito Control' authority." *Id.* at 19a. The large tract purchased in the final transaction, including what is now called Plat 57, was acquired subject to "building restrictions imposed by any governmental agency," C.A. App. A3633 (option agreement), including a ban on filling "areas subject to regular inundation by tidal * * * flowage" without a CWA permit, 33 C.F.R. 209.120(g)(3)(i) (1975) (eff. Apr. 3, 1974). The amount of the overall purchase price that is attributable to Plat 57 is $5370. C.A. App. A2028 (joint stipulation of facts).

From 1969 through the mid-1990s, respondent developed about 1300 acres of the property it had purchased into John's Island, an "upscale gated residential community" nestled between the Atlantic Ocean and the Intracoastal Waterway. App., *infra*, 16a; see *id.* at 80a. The community encompasses nearly 1400 residences on the Island of John's Island, Gem Island, and a portion of an unnamed barrier island. *Id.* at 141a; see *id.* at 17a (community map). Although respondent never prepared an "explicit overarching plan for development" of John's Island, "a definite pattern of development emerged on an opportunistic basis over time." *Id.* at 151a. Proceeding "in a 'piecemeal' manner," respondent built infrastructure, recorded plats, and sold lots to residential builders and home buyers. *Id.* at 18a. Respondent developed Stingaree Point, the area where Plat 57 is located, between 1985 and 1986. *Id.* at 19a. "At that time, the company built Stingaree Point Road, installed water and sewer lines, and recorded Plat 40," which had six lots for home

sites. *Ibid.* "Although [respondent] neither 'stubbed out' [utilities to] nor recorded Plat 57 when it developed the rest of Stingaree Point, an April 1986 appraisal stated that 'Stingaree Point development is substantially completed.'" *Id.* at 20a (citation omitted).

Respondent's development of the John's Island community was largely finished by the mid-1990s, but respondent continued to own some residual land in the community, most of which was wetlands. App., *infra*, 27a, 80a-81a. Wetlands were relatively unattractive for development because the preparatory construction costs were substantial, and they could not be brought to grade without government permits. C.A. App. A1709-A1710 (testimony of respondent's consultant); see App., *infra*, 46a-48a (detailing substantial costs and risk factors associated with wetlands development). In the 1990s, respondent took stock of its remnant property in the community and began to "pursu[e] the sale or other disposition of [that] property." App., *infra*, 78a (quoting testimony of respondent's president); see *id.* at 79a-83a.

Respondent first proposed to turn several acres of wetlands into waterfront home sites on the Horse's Head peninsula, located on the Island of John's Island. App., *infra*, 82a; see *id.* at 17a. As required by the CWA, respondent applied to the United States Army Corps of Engineers (Corps) for a permit to fill those wetlands. *Id.* at 82a; see 33 U.S.C. 1311(a) (prohibiting "the discharge of any pollutant" into navigable waters except in accordance with the CWA's terms); 33 U.S.C. 1344(a) (authorizing the Corps to "issue permits * * * for the discharge of dredged or fill material * * * at specified disposal sites"). While

the application was pending, respondent sold the property to a corporation formed specifically to develop Horse's Head peninsula. App., *infra*, 82a-83a & n.15. In 2000, the Corps issued a CWA permit for filling the Horse's Head wetlands, which were later recorded as Plat 54. *Id.* at 83a n.15, 142a.

Although respondent had disclaimed an interest in developing additional wetlands in the Johns Island community, App., *infra*, 192a, it subsequently turned its sights to Plat 57, the 4.99 acres at issue here, and sought a CWA permit in 2002 to convert some of the wetlands in that area into another "estate size lot with waterfront access in John's Island Development," *id.* at 166a; see *id.* at 3a. The Corps denied the application in 2004. *Id.* at 159a-211a. The Corps found that Plat 57's wetlands are "a high-quality, tidally-influenced, mangrove swamp" that "serves an integral role in the overall health of this partially-impaired watershed." *Id.* at 192a. The Corps noted that respondent already "has had very reasonable use of its land at John's Island" pursuant to prior CWA permits, "includ[ing for] the construction of causeways, excavation of canals and the placement of fill for the development of 4 single-family lots (Horse's Head, Plat 54)." *Id.* at 187a.

The Corps determined as well that when it was considering the application for the Plat 54 permit, it had "specifically questioned whether any other wetland areas within John's Island were being considered as potential development sites," App., *infra,* 176a, and respondent had represented "that any other development of lands owned by [respondent] at John's Island Development would be on parcels[that] have developable uplands," *id.* at 192a. The Corps further found

that development of the Plat 54 home sites was a "less environmentally damaging" and "practicable" alternative that had permitted respondent to achieve its stated project purpose. *Id.* at 188a; see 40 C.F.R. 230.10(a) (2000) (providing that a permit may not issue "if there is a practicable alternative to the proposed [fill] which would have less adverse impact on the aquatic ecosystem"). "It is clear," the Corps concluded, that respondent "has piecemealed [its] development and that reasonable use of the property has been achieved." App., *infra*, 188a.

In sum, the Corps denied the permit because "there is a practicable alternative with less effect on the aquatic ecosystem," "the project purpose has already been realized through development of homesites within the subdivision," and issuing a permit "would contribute to significant degradation of a very high-value aquatic ecosystem." App., *infra*, 198a. Respondent did not contest the Corps' decision through the administrative or judicial process. See 5 U.S.C. 701–706; 33 C.F.R. Pt. 331.

2. a. In 2008, respondent brought this action in the Court of Federal Claims (CFC) seeking compensation for an alleged taking of Plat 57 based on the Corps' denial of a CWA permit to fill the wetlands. After a bench trial, the court held that no taking had occurred. App., *infra*, 61a-129a. The court observed that "determination of the relevant parcel" against which to measure the economic impact of the permit denial was the "key issue of the case." *Id.* at 62a. To determine what land constituted the relevant parcel, the court explained that it was necessary to consider "a number of factors, * * * including: (1) the degree of contiguity between property interests, (2) the dates

of acquisition of property interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, * * * (5) the extent to which the regulated lands enhance the value of the remaining lands," and "(6) the extent to which any earlier development had reached completion and closure." *Id.* at 98a (brackets and citation omitted).

Applying those factors, the CFC concluded that the relevant parcel comprised all the remaining land respondent continued to own in the John's Island community at the time it sought the permit—namely, Plat 57, a contiguous uplands area known as Plat 55, and other scattered residual wetlands. App., *infra*, 117a-118a. The court observed that this Court's decision in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*), supported aggregating respondent's remaining holdings in the community in determining the parcel as a whole. App., *infra*, 117a. The CFC further emphasized that "[t]he usage objectives of Plat 55 and Plat 57 * * * are comparable," because "[respondent] hopes to sell for profit the lots" on Plat 55. *Id.* at 115a. In addition, the CFC continued, Plat 55 and Plat 57 are "undoubtedly contiguous," *ibid.*, and respondent had acquired all the land it owned in the community through a "bulk purchase" under the 1968 option agreement, *id.* at 105a. The court rejected the government's argument that the entire tract respondent purchased to develop the John's Island community constituted the parcel as a whole in determining whether the denial of a CWA permit to fill a small portion of wetlands in that tract resulted in a regulatory taking. *Id.* at 113a. But the

court also rejected respondent's argument that "Plat 57 should be considered alone as the relevant parcel." *Id.* at 104a (citation omitted).

After determining the relevant parcel, the CFC found that the permit denial "diminished the value of [respondent's] property by approximately 58.4%." App., *infra*, 123a. Because that "degree of diminution plainly does not constitute the type of total economic wipeout that constitutes a categorical taking under *Lucas*," the court applied the criteria set forth in *Penn Central* to respondent's claim. *Ibid.*; see *id.* at 123a-128a. In applying that test, the court found the economic impact of the regulation to be the "dispositive" factor, concluding that the diminution in value of 58.4% was "insufficient to give rise to a taking." *Id.* at 128a.[1] Accordingly, the court entered judgment for the government. *Ibid.*

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[1] With respect to the other *Penn Central* factors, the CFC found that "[respondent] admittedly had little expectation regarding Plat 57 when purchased," App., *infra*, 127a, but "arguably possessed expectations for Plat 57 beginning in 2001 or 2002," albeit "subject to the regulatory regime then in place," *id.* at 125a. The court believed those expectations were "not objectively unreasonable" because of the State's approval of a permit for the project and a third party's projected development at another location. *Ibid.* The CFC therefore concluded that "[a]n assessment of the investment-backed expectations is closely divided." *Id.* at 127a; see *id.* at 37a ("The court found that the investment-backed expectations factor was virtually in balance with no weighting in favor of either side."). The court believed that "the character of the government's action tends to favor [respondent]," because "prior mosquito-control actions taken on the property had reduced its value as a wetland" and because the Corps had tied the permit denial to respondent's prior development activity within the John's Island community and so might have granted a permit to a differently situated applicant. *Id.* at 127a.

b. The court of appeals reversed the CFC's ruling and remanded for further proceedings, holding that the CFC had "erred in its determination of the relevant parcel." App., *infra*, 16a. Although the court of appeals stated that the parcel-as-a-whole inquiry is "flexible" and "designed to account for factual nuances," it held that "the critical issue is the economic expectations of the claimant with regard to the property." *Id.* at 25a (citations and internal quotation marks omitted).

Based on that proposition, the court of appeals concluded that Plat 57 alone should be deemed the relevant parcel because respondent "did not include Plat 57 in its formal or informal development plans for the community." App., *infra*, 26a. Rather, the court continued, respondent had "ignored" that area and "did not seek a fill permit or run utility service to the area that became Plat 57 when it developed the rest of Stingaree Point," including Plat 55. *Id.* at 27a. The court observed that respondent "was essentially unaware of its ownership of Plat 57 until the company prepared an inventory of its residual properties in 1995." *Ibid.* The court also noted that respondent had "transitioned its business from real estate development to focus on investment in commercial properties" by the time it "proposed to fill wetlands on Plat 57," which the court believed "reinforce[d] the conclusion that [respondent] did not consider Plat 57 part of the same economic unit as the John's Island community." *Id.* at 27a-28a.

The court of appeals further determined that Plat 57 should not have been aggregated with the rest of the property respondent still owned in the John's Island community at the time it sought the permit,

because "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." App., *infra*, 28a-29a. Instead, the court concluded that "the relevant parcel is Plat 57 alone" because, in its view, respondent "had distinct economic expectations for each of Plat 57, Plat 55, and its scattered wetland holdings in the vicinity." *Id.* at 29a. The court accordingly remanded for the CFC to "determine the loss in economic value to Plat 57[,] * * * and then [to] apply the appropriate framework to determine whether a compensable taking occurred." *Ibid.*

c. On remand, the CFC held that Plat 57 had suffered a diminution in value of about 99.4% based on a comparison of the land's fair market value without a CWA permit (which the court calculated to be $27,500) and its value with a permit and ready for preparation to be used as a home site (which the court calculated to be about $4.2 million). App., *infra*, 54a. Although it was undisputed that Plat 57's residual value without a permit exceeded the amount respondent had paid for that 4.99-acre area, adjusted for inflation, the court concluded that respondent had suffered "a categorical taking under *Lucas*" because "the assigned valuation without a permit is a nominal amount that does not reflect any economic use." *Ibid.*[2] Having found that

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[2] "For completeness," the CFC also analyzed respondent's claim under the *Penn Central* framework and concluded that it "leads to the same result." App., *infra*, 54a, 58a. With respect to economic impact, the court stated that "a diminution in value of 99.4% * * * weighs very strongly in [respondent's] favor." *Id.* at 57a. The court declined to revisit its prior conclusions that the investment-

"the Corps' denial of the Section 404 permit application for Plat 57 has effected a taking," *id.* at 59a, the court awarded respondent about $4.2 million in compensation, plus interest, *id.* at 59a-60a.

d. The court of appeals affirmed. App., *infra*, 1a-14a. As relevant here, the court agreed with the CFC that "a *Lucas* taking occurred because the government's permit denial eliminated all value stemming from Plat 57's possible economic uses." *Id.* at 2a.[3] The court further ruled that courts must not "consider[] * * * the landowner's investment-backed expectations" when adjudicating a claim of an alleged categorical taking under *Lucas*. *Id.* at 6a-7a. The court accordingly affirmed the $4.2 million judgment in respondent's favor. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

The Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The purpose of the clause "is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 618 (2001) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

The court of appeals in this case sharply departed from that purpose and seriously distorted regulatory-takings jurisprudence in two significant respects.

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backed-expectations factor did not favor either party and that the character of the government action weighed in respondent's favor. *Id.* at 55a-57a.

[3] Because "*Lucas* does not require a balancing of the *Penn Central* factors," the court of appeals declined to "address the trial court's alternate holding under *Penn Central*." App., *infra*, 14a.

First, the court rested on respondent's *lack* of development expectations for Plat 57 in determining that it alone was the relevant parcel against which to measure the economic impact of the permit denial, not the far larger area of which it was part and which respondent developed into the John's Island community with the benefit of a number of permits issued by the Corps. Respondent admittedly had no specific and distinct expectation of developing Plat 57 when it purchased the entire 1300-acre area that became the John's Island community. And respondent's expectation to develop uplands, but not wetlands, was driven by their relative suitability for home construction and by the regulatory regime itself. By giving dispositive effect to respondent's lack of any expectations for Plat 57 when it developed the rest of the community, the court disregarded the requirement to consider various factors in the parcel-as-a-whole inquiry and flouted this Court's teaching that the relevant parcel should not be defined in terms of the regulation being challenged. Second, the court of appeals erred in ruling that a landowner's lack of reasonable, investment-backed expectations is wholly irrelevant in adjudicating a regulatory-takings claim under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The court of appeals' erroneous analysis warrants this Court's review. The parcel-as-a-whole determination plays a critical role in regulatory-takings cases in determining whether a taking has occurred. And the question whether *Lucas* requires a court to disregard the absence of any distinct and reasonable investment-backed expectations of developing property will often be dispositive in cases like this one, where a developer contends that the parcel as a whole should

be confined to the regulated remnant of a far larger tract because the developer had no expectation of developing that portion. Lower courts have reached divergent conclusions on both issues, demonstrating the need for this Court's guidance on these important regulatory-takings questions.

This Court's review is also warranted in light of the profoundly unjust consequences that result from combining the court of appeals' erroneous rulings in this case. The court held that respondent's nonexistent expectations for the residual and regulated portion of its 1300-acre property during the entire time that respondent developed the larger tract of which it was a part justified treating that 4.99-acre portion as an independent parcel. And the court then held the government liable for a per se taking without considering whether the regulatory action actually interfered with any distinct investment-backed expectations for that parcel. In short, the court found a taking because respondent *did not* have distinct investment-backed expectations of developing the small portion of the overall 1300-acre area that had been acquired subject to development restrictions. That backward reasoning led to an absurd outcome: The government has been ordered to pay respondent more than $4.2 million for a piece of wetlands that respondent purchased for an attributed $5370 share of the overall purchase price and then ignored for decades while developing and selling the contiguous uplands at a substantial profit. The petition for a writ of certiorari should be granted and the court of appeals' decisions should be reversed.

I. THE COURT OF APPEALS' RULINGS SUBVERT PARCEL-AS-A-WHOLE ANALYSIS AND INVERT THE ROLE OF INVESTMENT-BACKED EXPECTATIONS IN REGULATORY-TAKINGS JURISPRUDENCE

A. The court of appeals erred in concluding that Plat 57 alone constituted the relevant parcel for purposes of assessing respondent's takings claim.

1. As this Court has repeatedly recognized, a regulatory-takings analysis must consider the effect of land-use regulation on the "parcel as a whole." See, *e.g.*, *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330-331 (2002) (*Tahoe-Sierra*); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978) (*Penn Central*). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922). To avoid that outcome, "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," but rather focuses "on the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130-131. The parcel-as-a-whole principle also prevents the plaintiff from "defining the property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra*, 535 U.S. at 331.

As the CFC correctly recognized in its original decision granting judgment in the government's favor, courts must consider a number of factors in determining what land constitutes the parcel as a whole in a regulatory-takings case. App., *infra*, 98a. The natu-

ral starting point—and, quite often, the end point—for the relevant-parcel determination is "the metes and bounds that describe [the] geographic dimensions" of contiguous acres held under common ownership. *Tahoe-Sierra*, 535 U.S. at 331. Other relevant factors include the dates of an owner's acquisition of property interests and the relation of that timing to the application of the regulatory regime, the use to which an owner has put the property, the owner's demonstrated expectations with respect to the property, whether the property is linked through an explicit or implicit development scheme, and the extent to which regulated portions of land are integrated with and enhance the value of unregulated portions. See App., *infra*, 98a, 100a. In line with this Court's regulatory-takings jurisprudence generally, courts evaluating those factors should "resist the temptation to adopt *per se* rules" and instead must engage in a fact- and context-specific inquiry. *Tahoe-Sierra*, 535 U.S. at 326 (recognizing the preference in the regulatory-takings analysis for examination of "'a number of factors' rather than a simple 'mathematically precise' formula"). By evaluating all the relevant circumstances, courts can align their parcel-as-a-whole determinations with "the concepts of 'fairness and justice' that underlie" the Just Compensation Clause. *Id.* at 334.

An analysis of all the relevant factors in this case demonstrates that the court of appeals clearly erred in concluding that Plat 57, a residual piece of a far larger tract that respondent purchased for development, should be isolated from all other property interests in the John's Island community that respondent once owned—or even still owned—and instead be treated as a separate "parcel as a whole." Respondent pur-

chased Plat 57 along with 1300 acres of largely contiguous land, which respondent then profitably developed into a single community. App., *infra*, 105a. Although respondent's "pattern of development emerged on an opportunistic basis over time," *id.* at 151a, respondent's construction of security gates at the community's borders demonstrates that respondent viewed the 1300-acre tract as a unified development project, *id.* at 85a. Wetlands like Plat 57 are not only physically part of the John's Island community, but they also enhance the value of the surrounding uplands. See C.A. App. A6260 (John's Island resident's letter to Corps) ("One of the major considerations in buying the property was the protection of these wetlands. Further, this protection enhanced the perceived value of [residents'] property and was reflected in a much higher purchase price."). The court of appeals therefore should have treated the entire 1300-acre tract as the relevant parcel as a whole.

Furthermore, although respondent had sold much of the property it owned in the community by the time it sought a CWA permit to fill Plat 57, it continued to own Plat 55, a valuable upland tract that was "undoubtedly contiguous" to Plat 57 and was held by respondent for the same "usage objective[]" that the court of appeals attributed to respondent for Plat 57—"sell[ing] [the home sites] for profit." App., *infra*, 115a. Thus, quite aside from the extensive benefits respondent realized through its development of the rest of the tract it acquired for the John's Island community—including permits from the Corps for construction of causeways, excavation of canals, and filling wetlands for the lots on Horse's Head peninsula—the court of appeals should have found that the

parcel as a whole comprised at the very least Plats 55 and 57, which together formed an identifiable residuum of respondent's far larger tract for which respondent retained significant development prospects.

2. The court of appeals erred by instead holding that Plat 57 alone constituted the relevant parcel based on the view that respondent had "distinct economic expectations for [it]." App., *infra*, 29a. Respondent "admittedly had little expectation" for developing Plat 57's wetlands when it purchased the far larger tract of which Plat 57 was a part. *Id.* at 127a. And the court emphasized that respondent had no specific expectation of developing Plat 57's wetlands when it developed the infrastructure for and ran utilities to uplands tracts in the same vicinity, including Plat 55. *Id.* at 20a-21a, 27a-28a. To the court, this meant that respondent "did not consider Plat 57 part of the same economic unit as the John's Island community," *id.* at 28a, which the court believed to be "the critical issue" in the parcel-as-a-whole analysis, *id.* at 25a (citation and internal quotation marks omitted). In doing so, the court relied on a fact that should have been dispositive in *rejecting* respondent's takings claim as a justification for accepting that claim.

In effect, the court of appeals split the John's Island project into two temporal segments: A principal phase, in which respondent developed and sold nearly all its holdings in the community; and a residual phase, in which respondent tried to "divest itself of [its] remaining real estate holdings in the vicinity of John's Island." App., *infra*, 27a. But by focusing solely on the residual phase, the court missed the forest for the trees. Viewed in the overall course of the development of John's Island, the CWA "place[d] a bur-

den on the use of only a small fraction" of respondent's land. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 500 n.27 (1987) (*Keystone*). Instead of giving effect to that practical reality and to Plat 57's obvious location as part of the overall John's Island community that respondent developed, the court artificially divided an otherwise unitary tract into exploited and unexploited segments based solely on the timing of respondent's own development activities and a regulatory action affecting a small, environmentally sensitive portion of the larger, unitary tract.

The court of appeals' approach also conflicts with this Court's instruction that the parcel as a whole should not be defined by reference to "the very regulation being challenged." *Tahoe-Sierra*, 535 U.S. at 331. The court of appeals placed dispositive weight on respondent's "distinct economic expectations" for regulated and unregulated property. App., *infra*, 29a. But that difference in expectations was attributable to the restriction itself. Respondent surely developed most of the uplands portions of the John's Island community first not only because they were inherently more suitable than wetlands for construction of homes, but also because it was not required to obtain a CWA permit to do so. See *id.* at 142a (noting that Plat 55, which was prepared for development in the 1980s, was "located on upland and no Corps permit was required" to develop it). Respondent concededly "ignored" Plat 57 during that time, *id.* at 27a, and that was surely because it consisted of regulated wetlands and so, comparatively speaking, was more difficult to develop. Because the timing of respondent's development efforts was driven by the regulatory scheme

itself, the court's decision to define the relevant parcel solely based on respondent's development expectations triggered the "circular" analysis that the parcel-as-a-whole doctrine is designed to avoid. *Tahoe-Sierra*, 535 U.S. at 331. Among its many faults, that mode of analysis would permit any developer to steadily narrow its parcel as a whole through the ordinary course of development of more desirable and less regulated property and then claim a total taking of the last undeveloped—and highly regulated—remnant of its original holding.

B. The court of appeals exacerbated the fundamental error in its parcel-as-a-whole analysis by holding that respondent's lack of any reasonable and distinct investment-backed expectations to develop Plat 57 did not preclude a finding of a categorical taking of that area under *Lucas*.

1. This Court assigns "particular significance" in the regulatory-takings analysis to "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. In particular, this Court's precedents indicate that the existence or absence of reasonable, investment-backed expectations is a relevant factor even when a claimant alleges that a regulation has completely eliminated his property's value. In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court held that a statute that authorized the government to publicly disclose trade secrets it received from a company as part of a registration process did not effect a taking where the company "had no reasonable, investment-backed expectation" that the information would remain secret, even though the government's disclosure of the data "destroy[ed]" the "economic value of th[e] property right."

Id. at 1008, 1012. The Court emphasized that, to obtain the economic advantages of registration, the company had voluntarily submitted the data with knowledge that the trade secrets would eventually be subject to public disclosure. *Id.* at 1006-1007. And the Court found that the absence of reasonable, investment-backed expectations was "so overwhelming * * * that it dispose[d] of the taking question regarding those data." *Id.* at 1005. The Court thus has recognized that the absence of interference with reasonable, investment-backed expectations may itself be dispositive of a regulatory-takings claim, regardless of the extent of the challenged regulation's economic impact. See *ibid.*; see also *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.").

In this case, as in *Monsanto*, respondent's lack of distinct and reasonable investment-backed expectations for Plat 57 is "so overwhelming" as to foreclose a finding that a taking occurred. 467 U.S. at 1005. Respondent openly disavowed having any expectation of developing Plat 57 from 1974, when it acquired the far larger tract of which it was a small part, until 2002, when it finally sought a CWA permit. See App., *infra*, 16a, 20a. Respondent could not show that it had any reasonable and distinct investment-backed expectations for wetlands that were subject to preexisting CWA restrictions on development when the area was purchased and then "ignored entirely" for 28 years while respondent developed the remainder of the tract. *Id.* at 20a; see, *e.g.*, *Palazzolo*, 533 U.S. at 633

(O'Connor, J., concurring) ("[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of th[e claimant's] expectations."). Respondent's new expectations that it claims sprung into being for development of Plat 57 in 2002 were unaccompanied by any new investment of the sort that could create distinct, investment-backed expectations specifically with respect to Plat 57, where no cognizable expectation at all had existed before. And those unilateral expectations were especially unreasonable given that the Corps had just issued a CWA permit for another tract of land with respondent's assurance that respondent did not plan to develop other wetlands in the John's Island community. App., *infra*, 176a-177a, 192a-193a.[4] The absence of reasonable, investment-backed expecta-

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[4] The CFC found that respondent's post-2002 expectations to develop Plat 57 were "not objectively unreasonable" in part because the state permitting authority issued a permit for the project. App., *infra*, 125a. But the state authority granted a permit without considering whether a practicable alternative existed that would cause less environmental damage. See Fla. Admin. Code Ann. r. 40C-4.091(1)(a) (2002) (App., *infra*, 227a) (incorporating St. Johns River Water Mgmt. Dist., *Applicant's Handbook: Management and Storage of Surface Waters* § 12.2.1.2(b) (2002) (App., *infra*, 228a)). In contrast, the Corps may not grant a permit if a practicable alternative exists. See 40 C.F.R. 230.10(a) (2000); see also App., *infra*, 166a (observing that the state permitting authority "follows a different method of analysis" in determining whether to grant a permit). The Corps based its permit denial for Plat 57 in part on the presence of practicable alternatives. See *id.* at 188a. The state agency's decision to grant a permit under a different standard accordingly could not provide respondent with reasonable expectations that it would be able to develop Plat 57 under the CWA, quite aside from the absence of any distinct *investment-backed* expectation for that wetlands area.

tions in this case has such "force" that it should have "dispose[d] of the taking question." *Monsanto*, 467 U.S. at 1005.

2. Following prior circuit precedent, the court of appeals concluded that a regulation that deprives land of all economic value "require[s] just compensation" under this Court's decision in *Lucas*, "without consideration of the landowner's investment-backed expectations." App., *infra*, 6a-7a (citing *Palm Beach Isles Assocs.* v. *United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000)). That is not correct.

Lucas did not hold that it is irrelevant whether a property owner had reasonable, investment-backed expectations for the particular parcel whenever a "total" taking is alleged. As *Lucas* explained, this Court has "generally eschewed any set formula" in deciding "when, and under what circumstances, a given regulation * * * go[es] too far for purposes of the Fifth Amendment," preferring instead to "engag[e] in . . . essentially ad hoc, factual inquiries." 505 U.S. at 1015 (citations and internal quotation marks omitted; second set of brackets in original).

Lucas explained that a regulatory action that effects a "total" taking is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." 505 U.S. at 1015. But *Lucas* did not suggest that a property owner's lack of reasonable, investment-backed expectations would be of no moment. The facts of the case did not present that issue, as the landowner in *Lucas* had reasonable, investment-backed expectations for two beachfront lots he purchased before the challenged regulatory regime had been enacted. See *id.* at 1008 (observing that the landowner purchased the lots at a time when

"he was not legally obliged to obtain a permit from the [relevant state authority] in advance of any development activity," and that the owner had expected to erect single-family residences on the lots, as the owners of the immediately adjacent parcels had been allowed to do). *Lucas* accordingly cannot be read to suggest that courts must disregard the absence of reasonable, investment-backed expectations in adjudicating an alleged categorical regulatory taking. See *id.* at 1034 (Kennedy, J., concurring in the judgment) ("The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations.").

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S REVIEW

A. As demonstrated by this Court's decision to grant the petition for a writ of certiorari in *Murr* v. *Wisconsin*, cert. granted, No. 15-214 (Jan. 15, 2016), the question of how to determine the parcel as a whole in a regulatory-takings case warrants this Court's review. See Pet. at i, *Murr*, *supra* (No. 15-214). Identification of the relevant parcel frequently is a "critical question[]" that can be determinative of whether a regulatory taking has occurred. *Keystone*, 480 U.S. at 497; see App., *infra*, 24a ("In many cases, as here, the definition of the relevant parcel of land is a crucial antecedent that determines the extent of the economic impact wrought by the regulation."); see also *District Intown Props. Ltd. P'ship* v. *District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (observing that the "definition of the relevant parcel profoundly influences the outcome of a takings analysis"), cert. denied, 531 U.S. 812 (2000).

The question of the relevance of a landowner's reasonable, investment-backed expectations—or lack thereof—to the categorical-takings analysis also merits this Court's review. That issue will often be dispositive in cases like this one, where a developer successfully argues that the parcel as a whole should be confined to a residual or highly regulated portion of a larger tract, because there frequently would be no expectation of developing that portion. This Court should decide whether a claimant may hold the government liable for a per se taking by narrowing the parcel as a whole in that manner and then avoiding any consideration of the absence of any distinct and reasonable investment-backed expectations under the *Lucas* test.

The court of appeals' rulings in this case—which place dispositive weight on an owner's failure to form expectations for a residual or regulated portion of land in determining the parcel as a whole, and which then ignore the lack of any distinct, investment-backed expectations in analyzing whether a categorical taking has occurred—are in tension with decisions from other lower courts. Whereas the Federal Circuit discounted the fact that respondent owned contiguous land in the same community that it had acquired in the same transaction as Plat 57, other courts have recognized that factors such as common ownership, contiguity, and timing of acquisition should carry significant weight in the parcel-as-a-whole inquiry. See, *e.g.*, *Giovanella* v. *Conservation Comm'n*, 857 N.E.2d 451, 457-458 (Mass. 2006), cert. denied, 549 U.S. 1280 (2007); *K & K Constr., Inc.* v. *Department of Natural Res.*, 575 N.W.2d 531, 537 (Mich.), cert. denied, 525 U.S. 819 (1998); *Zealy* v. *City of Waukesha*, 548

N.W.2d 528, 532-533 (Wis. 1996). For example, the Wisconsin Court of Appeals in *Murr* v. *Wisconsin* held that, for purposes of applying regulatory-takings analysis to a hardship-based variance from a new development restriction, a parcel acquired after the restriction went into effect should be considered together with a contiguous parcel already belonging to the same owners, despite the owners' asserted "expectation of separate use" for the two parcels. No. 2013AP2828, 2014 WL 7271581 at *4, 8 n.8 (Dec. 23, 2014) (per curiam), review denied, 862 N.W.2d 899 (Tbl.) (Wis. 2014), cert. granted, 136 S. Ct. 890 (2016).

Similarly, although some lower courts have agreed with the Federal Circuit's refusal to consider the absence of reasonable, investment-backed expectations when determining whether a categorical taking has occurred, see, *e.g.*, *Anderson* v. *Charter Twp.*, 266 F.3d 487, 493 (6th Cir. 2001), other courts have held that even when "[i]t is uncontested th[at] [a] permit denial * * * deprives [a plaintiff] of all economically viable use of his property," courts should consider whether the plaintiff "had investment-backed expectations of developing his property," *McQueen* v. *South Carolina Coastal Council*, 530 S.E.2d 628, 631 (S.C. 2000), vacated, 533 U.S. 943 (2001); see *Reahard* v. *Lee Cnty.*, 968 F.2d 1131, 1136 (11th Cir. 1992) ("In order to resolve the question of whether the landowner has been denied all or substantially all economically viable use of his property, the factfinder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations."). The Court's review of these issues

would accordingly provide helpful guidance to lower courts.

B. Review is also warranted in light of the disturbing consequences that result from combining the court of appeals' rulings in this case. By holding in the manner it did that "the economic expectations of the claimant with regard to the property" is "the critical issue" in the parcel-as-a-whole inquiry, App., *infra*, 25a (citations and internal quotation marks omitted), the court has opened the door for any developer to argue that the relevant parcel should be confined to a small remainder or the regulated portion of a far larger tract, because, in contrast to the unregulated portion, the owner had little or no expectation of developing the land that was subject to regulatory restrictions. A developer could then take advantage of the court's further holding that the absence of reasonable, investment-backed expectations is irrelevant under *Lucas* to argue that a per se taking of the regulated portion has occurred after the unregulated portion has been developed.

The facts of this case vividly illustrate that point. Respondent anchored its parcel-as-a-whole argument in the concession that it "did not have any economic expectations for [Plat 57]" at the time of purchase or for decades thereafter. C.A. App. A85 (complaint). After respondent used that concession to narrow the relevant parcel to Plat 57 alone, without any new investment in that parcel, and so to "shoehorn its claim into th[e] [total-taking] analysis," *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993), it was able to rely on circuit precedent holding that the absence of expectations had to be ignored in determining whether a

categorical taking had occurred. The court of appeals' parcel-as-a-whole analysis thus rewarded respondent for *not* having investment-backed expectations for property that was acquired subject to preexisting regulatory restrictions—resulting in a finding that the government owed respondent $4.2 million for a per se taking of wetlands that respondent purchased as part of a larger tract for an attributed price of $5370 and had no reasonable expectation of developing at the time of purchase or for decades thereafter. While the Federal Circuit treated respondent's expectations as a factor of "particular significance" in the takings inquiry, *Penn Central*, 438 U.S. at 124, it did so in a manner directly contrary to this Court's instruction.

Because the Federal Circuit hears the vast majority of appeals in regulatory-takings actions filed against the United States, see 28 U.S.C. 1295(a)(3), 1346(a), 1491(a)(1), the rulings below "threaten[] to expose the federal government to enormous demands for windfall compensation awards" by large real estate developers like respondent. *Palm Beach Isles Assocs.* v. *United States*, 231 F.3d 1365, 1371 (Fed. Cir. 2000) (en banc) (Gajarsa, J., dissenting from the denial of rehearing en banc). The court of appeals suggested that it would not tolerate "strategic behavior," App., *infra*, 13a, but developers need not change their behavior or act strategically to exploit the Federal Circuit's doctrinal loopholes. The incentive created by the decisions below—to develop unregulated property before addressing the regulated remnants—aligns perfectly with economic forces that already motivate developers to do just that. See, *e.g.*, *id.* at 46a-48a (describing substantial costs and risk factors associated with wetlands development). Under the

court's decisions, it will not be difficult for a developer "to (1) purchase upland and submerged property together, (2) develop the upland property and sell it for a profit, (3) subsequently apply for a permit to fill the submerged property, and finally, (4) successfully claim a categorical taking if the permit is denied." *Palm Beach Isles Assocs.*, 231 F.3d at 1372 (Gajarsa, J., dissenting from the denial of rehearing en banc). But the public as a whole should not be forced to compensate large real estate developers for relatively minor regulatory impositions. The court's distortion of regulatory-takings jurisprudence merits this Court's review.

III. THE CASE SHOULD BE CONSIDERED TOGETHER WITH *MURR* v. *WISCONSIN*

In *Murr* v. *Wisconsin*, *supra*, the Court has agreed to consider the parcel-as-a-whole inquiry in a quite different context involving common ownership. As framed by the petition for a writ of certiorari in that case, the question presented in *Murr* is whether "two legally distinct, but commonly owned contiguous parcels, must be combined," in a situation where the two parcels were acquired at separate times. Pet. at i, *Murr*, *supra* (No. 15-214). That case, however, arises in the unusual context of the consideration of the adjacent parcels together for purposes of applying a provision for a hardship variance from a new regulatory restriction that was adopted before the parcels came under common ownership.

This case involves a portion of property that was acquired as part of a single purchase of a far larger tract and presents the question whether the absence of expectations for that portion when the larger tract was developed should be dispositive in determining

the parcel as a whole. The Federal Circuit's holding that a claimant's subjective expectations are "the critical issue" in the parcel-as-a-whole inquiry, App., *infra*, 25a (citation and internal quotation marks omitted), threatens to produce unsound and unjust results by inverting the proper role of investment-backed expectations in the takings analysis and by rewarding those private parties that can isolate less desirable and highly regulated portions of larger tracts and are most likely to have experienced the reciprocal benefit of land-use regulation. The court's erroneous decision independently warrants review, and we accordingly urge the Court to grant this petition for a writ of certiorari and resolve the case in conjunction with *Murr*.

Granting this petition would help ensure full consideration and exposition of proper criteria for determining the parcel as a whole in regulatory-takings cases. It would also be useful for the Court to consider the parcel-as-a-whole issue in the context of a large real estate developer like respondent, in addition to a small landowner like the petitioners in *Murr*. Moreover, granting this petition would provide the Court with an opportunity to clarify whether and how the absence of reasonable, investment-backed expectations factors into the takings analysis in a case such as this one, where a developer relies on the absence of expectations to narrow its parcel as a whole and then seeks relief for a categorical taking under *Lucas*.

If the Court declines to grant this petition at this time, it should hold the petition pending its decision in *Murr*, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be set for argument together with *Murr* v. *Wisconsin*, No. 15-214. In the alternative, the Court should hold this petition pending its decision in *Murr*, and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

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MARCH 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2014-5093

LOST TREE VILLAGE CORPORATION,
PLAINTIFF-APPELLEE

v.

UNITED STATES, DEFENDANT-APPELLANT

Decided: June 1, 2015

Appeal from the United States Court of Federal Claims in No. 1:08-cv-00117-CFL, Judge Charles F. Lettow

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Before: PROST, *Chief Judge,* NEWMAN, and REYNA, *Circuit Judges.*

REYNA, *Circuit Judge.*

On remand from *Lost Tree Village Corp. v. United States* ("*Lost Tree I*"), 707 F.3d 1286 (Fed. Cir. 2013), the Court of Federal Claims held that the government's denial of Lost Tree Village Corporation's application for a permit to fill wetlands on a 4.99 acre plat ("Plat 57") constituted a per se regulatory taking under *Lucas v.*

South Carolina Coastal, 505 U.S. 1003 (1992), and, alternatively, a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). We affirm that a *Lucas* taking occurred because the government's permit denial eliminated all value stemming from Plat 57's possible economic uses. We do not reach the trial court's alternate holding under *Penn Central*.

BACKGROUND

In 1968, Lost Tree entered into an option agreement to purchase approximately 2,750 acres of property on the mid-Atlantic coast of Florida.[1] The agreement gave Lost Tree the option to purchase various parcels of land, including a barrier island on the Atlantic coast, a peninsula west of the barrier island bordering the Indian River (known as the "Island of John's Island"), and other islands in the Indian River, including Gem Island and McCuller's Point. From 1969 to 1974, Lost Tree purchased most of the land covered by the option agreement, including half of McCuller's Point, the Island of John's Island, and Gem Island. The Island of John's Island and Gem Island include the 4.99 acres now known as Plat 57.

Beginning in 1969 and continuing through the mid-1990s, Lost Tree developed approximately 1,300 acres of the property purchased under the option agreement into the gated residential community of John's Island. The John's Island community includes property on the barrier island, Gem Island, and the Island of John's Island. The

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[1] *Lost Tree I* contains a thorough description of the significant volume of facts giving rise to this dispute. 707 F.3d at 1288-91. We include only facts necessary for this opinion.

community includes single family homes, a private hotel, condominiums, two golf courses, and a beach club.

Plat 57 is an undeveloped plat that lies on Stingaree Point, a small southerly peninsula on the Island of John's Island and Gem Island. Plat 57 consists of submerged lands and wetlands that have been disturbed by upland mounds vegetated by an invasive pepper species and by ditches installed for mosquito control. Though Lost Tree developed Stingaree Point and land bordering Plat 57, Lost Tree had no plans of developing Plat 57 until 2002.

In early 2002, Lost Tree learned that a developer applied for a wetlands fill permit for land south of Plat 57. As mitigation for the permit, the developer proposed improvements to a mosquito control impoundment on McCuller's Point. Because Lost Tree owned land on McCuller's Point, permitting authorities required Lost Tree's consent to the proposed mitigation. Lost Tree withheld approval and instead sought permitting credits in exchange for the developer's proposed improvements.

To take advantage of the potential permitting credits, Lost Tree sought permits and approvals required to develop Plat 57. In August 2002, Lost Tree submitted an application to the Town of Indian River Shores requesting approval for a preliminary plat and permission to fill some of the wetland on Plat 57. Lost Tree filed a corresponding application for a wetlands fill permit under § 404 of the Clean Water Act, 33 U.S.C. § 1344. The town approved Lost Tree's application, and Lost Tree obtained zoning and other local and state permits necessary to begin developing Plat 57 into a residential lot. In August

2004, however, the Army Corps of Engineers denied Lost Tree's § 404 fill permit because the Corps determined that Lost Tree could have pursued less environmentally damaging alternatives and because Lost Tree had adequately realized its development purpose through the development of the John's Island community.

Lost Tree sued the government in the Court of Federal Claims, alleging that the government's permit denial constituted a taking under the Fifth Amendment. Lost Tree's appraiser opined that Plat 57 would be worth $25,000 without the fill permit and $4,800,000 with the permit after being developed into a residential lot. The government's appraiser opined that Plat 57 would be worth $30,000 without the permit and $4,720,000 with the permit and developed. The trial court did not determine Plat 57's loss in value because it held that the relevant parcel included Plat 57, Plat 55 (a nearby developed plat), and scattered wetlands within the John's Island community. Relying on the government's unrebutted testimony regarding the value of the relevant parcel as a whole, the trial court determined that the government's permit denial diminished the parcel's value by approximately 58.4%. *Lost Tree Vill. Corp. v. United States* ("*Lost Tree CFC I*"), 100 Fed. Cl. 412, 437 (2011). A 58.4% loss in value, while not insignificant, was not sufficient to maintain a takings claim according to the trial court. *Id.*

Lost Tree appealed that decision, and we reversed. The relevant parcel, according to the court, is Plat 57 alone because Lost Tree did not treat Plat 57 as part of the same "economic unit" as Plat 55 and the scattered wetlands included in the trial court's relevant parcel def-

inition. *Lost Tree I*, 707 F.3d at 1293-94. We remanded to the trial court with instructions to apply the appropriate takings framework after determining the loss in economic value to Plat 57. *Id.* at 1295.

On remand, the trial court found that the government's permit denial diminished Plat 57's value by approximately 99.4%. *Lost Tree Vill. Corp. v. United States* ("*Lost Tree CFC II*"), 115 Fed. Cl. 219, 231 (2014). Because Lost Tree and the government valued Plat 57 similarly in *Lost Tree CFC I*, the trial court averaged the parties' original estimates to determine Plat 57's loss in value. *Id.* at 228. Without a permit, the parties' estimated values averaged to $27,500. *Id.* Plat 57's with permit value, after being developed into a residential lot, averaged to $4,760,000.[2] *Id.* at 231. After subtracting development costs from Plat 57's averaged developed value, the trial court found that Plat 57's undeveloped, with permit value would be $4,245,387.93. *Id.*

The trial court held that Plat 57's loss in value was sufficient to maintain a takings claim. Because Plat 57 lost 99.4% of its value, the court held that the government's permit denial constituted a per se taking under *Lucas*. *Id.* In large part because of the economic impact to Plat 57, the trial court alternatively held that the

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[2] The government argued for the first time in *Lost Tree CFC II* that Plat 57's highest value should be its value before the government denied the permit. The court allowed the government to file an evidentiary proffer to explain its new theory but ultimately rejected the proffer because the government failed to provide enough specificity regarding Plat 57's value before the permit denial. *Id.* at 230.

government's permit denial constituted a taking under *Penn Central*. *Id.* at 233. The court awarded Lost Tree $4,217,887.93 (Plat 57's as permitted value minus Plat 57's nominal value) plus interest. *Id.* The government appealed, contesting the trial court's holding under *Lucas* and its alternate holding under *Penn Central*. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

Whether a government action constitutes a taking is a question of law based on underlying facts. *Bass Enters.*, 133 F.3d at 895. We review the trial court's conclusions of law de novo and underlying facts for clear error. *Id.*

Private property cannot "be taken for public use, without just compensation." U.S. Const. amend. V. A government regulation constitutes a taking under the Fifth Amendment if it "goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412-13 (1922). The seminal regulatory takings case, *Penn Central Transportation Co. v. New York City*, identifies three factors of particular significance in determining whether a regulation goes too far: (i) the "economic impact of the regulation on the claimant," (ii) the "extent to which the regulation has interfered with distinct investment-backed expectations," and (iii) "the character of the governmental action." 438 U.S. 104, 124 (1978).

In contrast to takings evaluated under *Penn Central*'s balancing test, two types of regulatory takings require just compensation "without case-specific inquiry into the public interest advanced in support of the restraint,"

Lucas, 505 U.S. at 1015, and without consideration of the landowner's investment-backed expectations, *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000). The first is a physical invasion. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982). The second is a regulation depriving a landowner of "all economically beneficial uses in the name of the common good," leaving the landowner with "economically idle" property. *Lucas*, 505 U.S. at 1019.

I. *Lucas*

The question presented in this appeal is whether residual value arising from noneconomic uses precludes application of *Lucas* and requires application of *Penn Central*'s balancing test. Confined to its facts, *Lucas* does not answer the question. In *Lucas*, the South Carolina legislature enacted a statute that prohibited a landowner from erecting any permanent habitable structures on his land. 505 U.S. at 1009. The state trial court found that the prohibition left the property *valueless*. *Id.* The Supreme Court emphasized that the prohibition denied the landowner all "economically beneficial *uses*" of his land. *Id.* at 1019 (emphasis added). Yet the Court used the term "use" synonymously with the term "value." *See id.* at 1019 n.8. The question of whether residual value attributable to noneconomic uses precludes *Lucas*'s per se treatment was not squarely answered, however, because the affected parcel in *Lucas* retained no value of any kind. *Id.* at 1009. Subsequent Supreme Court cases emphasize that a *Lucas* taking requires a total loss in economic value, *see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002),

but Supreme Court precedent does not address the precise facts before us, in particular, the existence of residual land value derived solely from noneconomic uses.

A. Residual Value

The trial court held that because the government's permit denial deprived Lost Tree of 99.4% of Plat 57's value, a *Lucas* taking had occurred. *Lost Tree CFC II*, 115 Fed. Cl. at 231. Recognizing that *Lucas* requires a total loss in economic value, *id.* at 228 (citing *Tahoe-Sierra*, 535 U.S. at 330), the trial court explained that Plat 57's residual value "does not reflect any *economic use*." *Id.* at 231 (emphasis added). Plat 57's residual value stems from environmental value as wetland. *Id.* at 231 n.9. Thus, Plat 57's residual value is not *economic* value, and hence *Lucas* applies.

The government argues that *Lucas* is about *value*, no matter its source. According to the government, if a regulated parcel retains any value, including environmental value, the landowner cannot maintain a *Lucas* claim. Lost Tree and Amicus Curiae respond that *Lucas* is about *use*. If a regulation deprives a landowner of all land use, *Lucas*'s per se treatment is appropriate.

We agree with the trial court that a *Lucas* claim falls somewhere between the parties' interpretations. While *Lucas* itself does not squarely address the issue, this court's precedent does. In *Loveladies Harbor, Inc. v. United States*, the government denied plaintiffs a § 404 fill permit. 28 F.3d 1171, 1173 (Fed. Cir. 1994). The fair market value of the affected parcel prior to the permit denial was over $2 million. *Id.* at 1174. After the permit

denial, the parcel was worth $12,500, less than one percent of its original value. *Id.* at 1175. Because the remaining value was "de minimis," the relevant parcel was "deprived of all economically feasible use," and *Lucas*'s per se treatment was appropriate. *Id.* at 1181-82.

The government argues that subsequent doctrinal developments at the Supreme Court conflict with *Loveladies Harbor*. We agree that subsequent decisions have explained that a *Lucas* taking is rare. In *Palazzolo v. Rhode Island*, the plaintiff argued that wetlands regulations reduced his land value by more than 93%. 533 U.S. 606, 616 (2001). That decrease in value was not sufficient to trigger *Lucas*'s per se treatment. *Id.* at 631. The Supreme Court more recently clarified in *Tahoe-Sierra* that *Lucas* "was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" 535 U.S. 302, 330 (2002) (emphasis in original) (quoting *Lucas*, 505 U.S. at 1017).

We disagree that post-*Lucas* Supreme Court developments conflict with our holding in *Loveladies Harbor*. In *Palazzolo*, the 93% loss in value was insufficient to trigger *Lucas* because the landowner was left with value attributable to economic uses. As the Court explained, "[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" *Palazzolo*, 533 U.S. at 631. The Court also indicated that the "State may not evade the duty to compensate on the premise that the landowner is left with a *token interest*[,]" implying that residual value does not defeat a categorical takings claim at least when residual value is not attributable to economic

uses. *See id.* at 629. In *Tahoe-Sierra*, the Court addressed a "temporary" takings claim. The Court explained that 32-month moratoria on development do not deprive a landowner of all economically beneficial use because economic use can resume at the end of the moratoria. *See Tahoe-Sierra*, 535 U.S. 302, 332 ("Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.").

The government argues that this court's precedent characterizes *Lucas* as applying only in the narrow circumstance in which all value, regardless of its source, has been lost. We disagree. After *Tahoe-Sierra*, our cases have characterized the *Lucas* inquiry in terms of "value." *See, e.g.*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1344 (Fed. Cir. 2003) (*Lucas* requires loss of "100% of a property interest's value"). Aside from *Loveladies Harbor*, however, our takings jurisprudence addresses circumstances such as those in *Tahoe-Sierra* and *Palazzolo* in which economic use (and hence economic value) was merely suspended, permitted on an unaffected portion of the parcel, or not entirely destroyed. *See, e.g.*, *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004); *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

B. Land Sale as an "Economic Use"

The government argues that a landowner's ability to sell an affected parcel is an economic use that precludes *Lucas*'s per se treatment. According to the government, *Lucas* classifies a sale as an economic use. The

government cites this court's decision in *Conti v. United States* for the same proposition. *See* 291 F.3d 1334 (Fed. Cir. 2002). Because Plat 57 has residual value, the government argues Lost Tree's ability to sell Plat 57 precludes *Lucas*'s application.

We disagree. The government's argument incorrectly assumes that negligible noneconomic appraisal value enables a landowner to sell a regulated parcel. As the trial court found, Plat 57's residual environmental value has been reduced by mosquito abatement measures, which left isolated hummocks and stagnant eutrophic pools. *Lost Tree CFC II*, 115 Fed. Cl. at 231 n.9. The government did not produce evidence indicating that Lost Tree could sell Plat 57 in such a condition. Speculative land uses are not considered as part of a takings inquiry. *See Olson v. United States*, 292 U.S. 246, 257 (1934).

Even if we assume that Plat 57's value necessarily enables Lost Tree to sell the parcel, we disagree that all sales qualify as economic uses. When there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land. Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel. *See, e.g.*, *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984) (logging); *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (landfilling); *United States v. Fuller*, 409 U.S. 488 (1973) (livestock grazing).

Contrary to the government's assertion, *Lucas* does not suggest that a land sale qualifies as an economic use.

The Court in *Lucas* referred to a "sale" as an economic use in the context of personal property whose "only economically productive use is sale or manufacture for sale." 505 U.S. at 1028 (citing *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (a case dealing with a prohibition on the sale of eagle feathers)). The Court explained that a personal property owner should be aware of the possibility that a regulation could render personal property worthless because of the State's "traditionally high degree of control over commercial dealings." *Id.* By contrast, in the context of real property, focusing *Lucas* "solely on market value" allows "external economic forces," such as inflation, to artificially skew the takings inquiry. *Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996).

The government cites this court's decision in *Conti v. United States* for the proposition that a sale qualifies as an economic use. *See* 291 F.3d 1334 (Fed. Cir. 2002). In *Conti*, a regulation banned drift gillnet fishing in the Atlantic Swordfish Fishery. *Id.* at 1344. The plaintiff alleged a taking because the regulation prevented him from using his gillnet fishing gear. The Court did not apply *Lucas* in part because the claimant could offer for sale or sell his gillnet fishing gear. *Id.* *Conti*, however, deals with personal property. Aside from that distinction, the claimant's ability to sell the commercial gillnet fishing gear stemmed from a potential buyer's ability to use that gear to fish somewhere other than in the Atlantic Swordfish Fishery. *See id.* The economic use, i.e., the owner's ability to sell, stemmed from a separate econom-

ically productive use. The same cannot be said of Lost Tree's alleged ability to sell Plat 57.

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 persuasively argues 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." Appellee Br. 21, n.7. Even if the government's hypothetical was plausible, this court considered and rejected a similar argument in *Loveladies Harbor*. 28 F.3d 1171, 1181 (Fed. Cir. 1994). The court explained that if such strategic behavior presented itself, "[o]ur precedent displays a flexible approach, designed to account for factual nuances." *Id.*

Framed differently—in the context of existing land ownership—the government's hypothetical lends support to the trial court's holding. To establish a per se claim under the government's reading of *Lucas*, a landowner would have to demonstrate that a regulation destroyed all land value, regardless of its source. Yet the fact that the landowner could make such a showing, according to the government's hypothetical, would prompt speculation giving rise to post-regulation land value. In other words, speculators would value otherwise valueless land based solely on the possibility that a *Lucas* taking could be maintained and that a takings judgment could be won. Land value resulting from such speculation would defeat the very *Lucas* claim on which the speculation was based.

II. Loss in Market Value

Because the trial court calculated Plat 57's loss in value by subtracting Plat 57's value without a permit from Plat 57's value with a permit, the government argues that the trial court overstated the economic impact to Plat 57. The government contends that the trial court should have subtracted Plat 57's value without a permit from Plat 57's demonstrated value before the permit denial (i.e., Plat 57's purchase price).

We disagree. Plat 57's value with a permit reflects Plat 57's "highest and best use." The highest and best use of a parcel is "the reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." *Olson*, 292 U.S. at 255. As the trial court understood, the government cannot rely on the regulatory taking at issue to reduce the fair market value of an affected parcel. *See Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986).

Conclusion

We affirm the trial court's holding that the government's permit denial constituted a per se regulatory taking under *Lucas* because Plat 57's residual value is not attributable to any economic uses. *Lucas* does not require a balancing of the *Penn Central* factors, and thus we do not address the trial court's alternate holding under *Penn Central*.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2012-5008

LOST TREE VILLAGE CORPORATION,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: Jan. 10, 2013

Appeal from the United States Court of Federal Claims in Case No. 08-CV-117, Judge Charles F. Lettow

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Before: RADER, *Chief Judge*, NEWMAN and REYNA, *Circuit Judges*.

RADER, *Chief Judge*.

The United States Court of Federal Claims determined that the Army Corps of Engineers did not effect a regulatory taking compensable under the Fifth Amendment when it denied Lost Tree Village Corporation's application for a permit to fill wetlands on its 4.99 acre plat (Plat 57). In reaching this conclusion, the Court of Federal Claims found Lost Tree's parcel as a whole includes Plat 57, a neighboring upland plat (Plat 55), and scattered

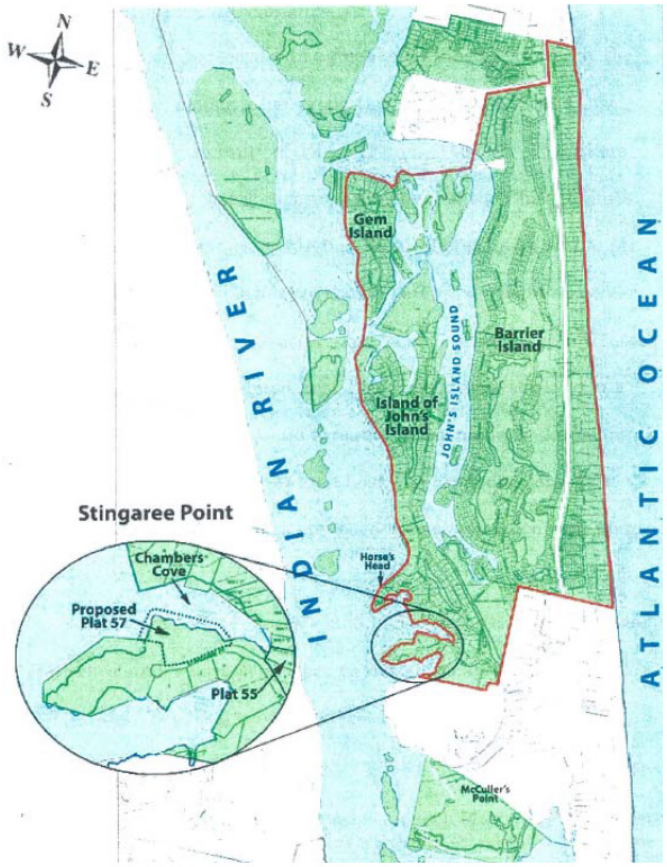
wetlands in the vicinity owned by Lost Tree at the time the permit was denied. Because the Court of Federal Claims erred in its determination of the relevant parcel, this court reverses and remands for further proceedings.

I

In 1968, Lost Tree Village Corporation (Lost Tree) entered an Option Agreement to purchase approximately 2,750 acres of property on Florida's mid-Atlantic coast, near the City of Vero Beach. The property covered by the Option Agreement encompasses a barrier island on the Atlantic Ocean, which is bisected by the A-1-A Highway, and stretches westward to interior land and islands on the Indian River. Lost Tree purchased substantially all of the land covered by the Option Agreement in a series of transactions during the period 1969-1974. In 1974, Lost Tree purchased the 4.99 acres now known as Plat 57 as part of a transaction in which it acquired the entire peninsula on which Plat 57 is located (known as the Island of John's Island), Gem Island, and other parcels in and along the Indian River.

Beginning in 1969 and continuing through the mid-1990s, Lost Tree developed approximately 1,300 acres of the property purchased under the 1968 Option Agreement into the upscale gated residential community of John's Island. The John's Island community includes most of Lost Tree's holdings on the barrier island, Gem Island, and the Island of John's Island. The John's Island community also includes some property that was not covered by the 1968 Option Agreement and was never owned by Lost Tree. Lost Tree built the infrastructure

for the community, including utilities, sewage systems, and the majority of the roads and bridges within the community. The community includes two golf courses, a beach club, a private hotel, condominiums, and single family homes. The map below shows the borders of the John's Island community outlined in red; Lost Tree's original holdings in the vicinity are shaded green. *Appellee Br.* at 8 (modified from trial exhibit).



Lost Tree's development of the John's Island community began on the Atlantic coast and eventually moved to the Island of John's Island and Gem Island in the early 1980s. The trial court found development of the community proceeded in a "piecemeal" manner, by "opportunistic progression," rather than strictly following any master development plan. *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 431-32 (2011). The Island of John's Island and Gem Island were developed over a period of many years, and involved numerous distinct plat recordings and government permits. *Id.*

In 1980, Lost Tree submitted to the Army Corps of Engineers (Corps) an application for a permit under § 404 of the Clean Water Act, 33 U.S.C. § 1344, to make numerous infrastructure improvements including construction of causeways connecting the barrier island, Gem Island, and the Island of John's Island. The application also sought approval to dredge canals and fill some wetland areas to create developable lots. Lost Tree's application was accompanied by plans and drawings for its proposed development of the Island of John's Island and Gem Island (the 1980 Development Plan). A drawing in the 1980 Development Plan depicts a substantial portion of Plat 57, as well as other areas, shaded in green and labeled "wildlife preserve." *Lost Tree*, 100 Fed. Cl. at 416.

The Corps did not act on Lost Tree's 1980 permit application as submitted because the State of Florida required numerous changes to Lost Tree's plans. Lost Tree submitted a revised proposal to the Corps in 1982. The proposal stated that "all originally proposed project

features are being deleted from this application except the bridge from John[']s [Island] to Gem Island and its approaches." *Id.* at 417 (alterations in original). The Corps approved a modified version of the 1982 application, and development of the Island of John's Island and Gem Island proceeded throughout the 1980s and 1990s "in a manner that diverged in significant ways from the 1980 Application." *Id.* at 431. During development, Lost Tree sought and received two additional § 404 permits for infrastructure improvements and construction of canals, and reserved various parcels as conservation easements by deed restrictions recorded in favor of the local, state, or federal government. Plat 57 was not among the land dedicated for conservation.

Plat 57 lies on Stingaree Point, a small peninsula located on the southwestern portion of the Island of John's Island. Lost Tree developed Stingaree Point in 1985—1986. At that time, the company built Stingaree Point Road, installed water and sewer lines, and recorded Plat 40, which is comprised of six lots to the south and west of the road. Also in 1985, Lost Tree "stubbed out" water and sewer lines to Plat 40 and to unplatted land on the eastern end of the Point that was later recorded as Plat 55. Lost Tree sold the six lots on Plat 40 within a few years after the plat was recorded. Homes have been built on those properties.

To east of Plat 40, on the north side of Stingaree Point Road, is the 4.99 acre tract eventually recorded as Plat 57. Plat 57 consists of 1.41 acres of submerged lands and 3.58 acres of wetlands with some upland mounds installed by Florida's "Mosquito Control" authority. To the east of

Plat 57 is a mosquito control impoundment, a narrow, 323 foot long shoulder along the north side of the road, and then Plat 55. Although Lost Tree neither "stubbed out" nor recorded Plat 57 when it developed the rest of Stingaree Point, an April 1986 appraisal stated that "Stingaree Point development is substantially completed, with the exception of the entrance area, landscaping, and a final layer of asphalt on the road." *Id.* at 418.

As the trial court found, Plat 57 was "ignored entirely" during Lost Tree's development of Stingaree Point and the rest of John's Island. *Id.* at 433. In 1994, when "most knowledgeable people considered development of the community of John's Island to have been completed, the property constituting Plat 57 had not been platted, utilities had not been extended to it, nor had it been dedicated to any use such as mitigation for a project on other plats." *Id.*

Lost Tree did not consider Plat 57 for development until approximately 2002, when the company learned it would obtain "mitigation credits" as a result of improvements a neighboring landowner had agreed to make as part of a development project. Lost Tree identified Plat 57 as a property that could be developed profitably to exploit the mitigation credits. In August 2002, Lost Tree filed an application with the Town of Indian River Shores requesting approval for a preliminary plat and permission to fill 2.13 acres of wetland on the property. The company then filed a corresponding application for a § 404 wetlands fill permit from the Corps. Lost Tree obtained all state and local approvals to develop Plat 57 into a site for one residential home. The Corps, however, denied

Lost Tree's § 404 permit application in August 2004, stating that less environmentally damaging alternatives were available, and that Lost Tree "has had very reasonable use of its land at John's Island." *Id.* at 425.

II

The Court of Federal Claims held a seven-day trial, after which it denied Lost Tree's takings claim. The trial court rejected the government's argument that the entire John's Island community is the relevant parcel for the takings analysis, finding Lost Tree's development of Plat 57 was "physically and temporally remote from" its development of the rest of the community. *Id.* at 433 (quoting *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000)). The court also rejected Lost Tree's argument that the relevant parcel was Plat 57 alone. Instead, the court determined that the relevant parcel is "Plat 57 and Plat 55, plus those scattered wetlands still owned by Lost Tree within the community of John's Island." *Id.* at 435. The court found that, while Plats 55 and 57 are "distinct legal parcels, they are undoubtedly contiguous." *Id.* at 434. Further, it found Lost Tree has comparable usage objectives for the two plats, because it hopes to sell for profit the lots on each plat.

Based on its relevant parcel determination, the trial court found the Corps' denial of the § 404 permit application for Plat 57 "diminished the value of Lost Tree's property by approximately 58.4%." *Id.* at 437. After analyzing the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the court

found the diminution in value insufficient support a takings claim. Lost Tree appeals, and this court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

III

"Whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings." *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998). This court reviews the Court of Federal Claims' conclusions of law without deference and reviews its findings of fact for clear error. *Id.*

Lost Tree asserts the denial of a § 404 permit to fill wetlands on Plat 57 by the Corps effectively deprived Lost Tree of its property such that it is entitled to just compensation under the Fifth Amendment. While the Government's authority to "prevent a property owner from filling or otherwise injuring or destroying vital wetlands" is unquestioned, the issue is whether the denial of a fill permit for a particular project imposes a disproportionate loss on the affected landowner. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 (Fed. Cir. 1994); *see Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) (holding regulatory takings inquiries are "informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

Regulations requiring land to be left substantially in its natural state—such as when a wetlands fill permit is

denied—may sometimes "leave the owner of land without economically beneficial or productive options for its use." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). In the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses," the regulatory action is recognized as a "categorical taking" that must be compensated. *Id.*; *see Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994). The only exception to compensation for such categorical takings is where the regulations prohibit a use that was not part of the landowner's title to begin with; that is, a limitation that inheres "in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029.

Most regulatory takings cases, however, are analyzed under the framework set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) ("Anything less than a 'complete elimination of value,' or a 'total loss' . . . would require the kind of analysis applied in *Penn Central*." (quoting *Lucas*, 505 U.S. at 1019-20 n.8)). *Penn Central* recognizes that the regulatory takings analysis is an "essentially ad hoc, factual inquiry," which requires courts to evaluate (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations. 438 U.S. at 124. If the court determines that the regulation "goes too far" such that it should be recognized as a

taking of private property for public use, then the government must provide just compensation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

In many cases, as here, the definition of the relevant parcel of land is a crucial antecedent that determines the extent of the economic impact wrought by the regulation. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the 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.'") (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)); *Palm Beach Isles*, 208 F.3d at 1380 (discussing the "denominator problem"). Definition of the relevant parcel affects not only whether a particular regulation is a categorical taking under *Lucas*, but also affects the *Penn Central* inquiry into the economic impact of the regulation on the claimant and on investment-backed expectations. The relevant parcel determination is a question of law based on underlying facts. *Palm Beach Isles*, 208 F.3d at 1380.

The Supreme Court has not settled the question of how to determine the relevant parcel in regulatory takings cases, but it has provided some helpful guideposts. *See Lucas*, 505 U.S. at 1016 n.7. First, the property interest taken is not defined in terms of the regulation being challenged; the takings analysis must focus on "the parcel as a whole." *Tahoe-Sierra*, 535 U.S. at 331 (quot-

ing *Penn Central*, 438 U.S. at 130-131). Second, the "parcel as a whole" does not extend to all of a landowner's disparate holdings in the vicinity of the regulated property. *Lucas*, 505 U.S. 1003, 1017 n.7 (characterizing as "extreme" and "unsupportable" the state court's analysis in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-34 (1977), *aff'd*, 438 U.S. 104 (1978), which examined the diminution in a particular parcel's value in light of the total value of the takings claimant's other holdings in the vicinity).

This court has taken a "flexible approach, designed to account for factual nuances," in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity. *Loveladies*, 28 F.3d at 1181. In this inquiry, the "critical issue is 'the economic expectations of the claimant with regard to the property.'" *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (quoting *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)). When a "developer treats several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel." *Forest Props.*, 177 F.3d at 1365 (holding relevant parcel included 53 upland acres and 9 acres of lake bottom where tracts were acquired at different times but "economic reality" was that owner treated the property as single integrated project).

Conversely, even when contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner develops distinct parcels at different times and treats the parcels as distinct economic units. *Palm Beach Isles*, 208 F.3d at

1381 (holding relevant parcel consisted of 50.7 acre wetland portion of original 311.7 acre purchase where landowner "never planned to develop the parcels as a single unit," and sold 261 acres of upland, oceanfront property prior to enactment of relevant regulatory scheme); *Loveladies*, 28 F.3d at 1181 (holding relevant parcel consisted of 12.5 acres from original 250 acre purchase where landowner developed and sold 199 acres before regulatory scheme was enacted and deeded remaining 38.5 acres to state in exchange for development permits).

Here, 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 trial court correctly found that Lost Tree did not include Plat 57 in its formal or informal development plans for the community. *Lost Tree*, 100 Fed. Cl. at 431-32. The only proposal that ever addressed Plat 57 was the unapproved 1980 Permit Application. While the 1980 application proposed dedicating Plat 57 as a wildlife preserve to mitigate other development, Lost Tree withdrew that application. Thus, when the Corps eventually granted Lost Tree's permit application, Plat 57 had no designated use.

The government argues Plat 57 was informally part of the John's Island development because Lost Tree intentionally included undeveloped land within the perimeter of its gated community. Lost Tree advertised such "open spaces" as part of the unique environment offered by John's Island. However, Lost Tree expressly planned open spaces in its development of the community, through the use of large lots for single family homes, and inclusion of golf courses and dedicated conservation wetlands.

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—when the company carried out the John's Island project. *Id.* at 433.

Lost Tree's actual course of development further demonstrates that it did not treat Plat 57 as part of the John's Island community. Lost Tree did not seek a fill permit or run utility service to the area that became Plat 57 when it developed the rest of Stingaree Point. Plat 55, by contrast, was brought to grade and water and sewer lines were stubbed out to that area. Although the company did not immediately plat the land that became Plat 55, it developed it in the mid-1980s in preparation for eventual sale as part of the John's Island community. Plat 57, by contrast, was absent from Lost Tree's development plans until 2002—at least seven years after the development of the John's Island community was considered complete. *Id.*

Indeed, the record shows that after 1982, Lost Tree was essentially unaware of its ownership of Plat 57 until the company prepared an inventory of its residual properties in 1995. At that time, Lost Tree had already transitioned its business from real estate development to focus on investment in commercial properties. The company also was working to divest itself of remaining real estate holdings in the vicinity of John's Island. When the Corps denied Lost Tree's § 404 permit application in 2002, the company held only the "West Acreage," which lies well outside the John's Island community, Plat 55, Plat 57, and scattered wetlands within John's Island. The objec-

tive 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. The company's long hiatus from development efforts reinforces the conclusion that Lost Tree did not consider Plat 57 part of the same economic unit as the John's Island community.

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 community of John's Island." *Id.* This finding, however, conflicts with the court's conclusion that the relevant parcel comprises not just Plat 57, but also Plat 55 and "scattered wetlands still owned by Lost Tree within the community of John's Island." *Id.* at 435. 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 that it developed Plat 40 on Stingaree Point.

The Court of Federal Claims erred by aggregating Plat 57, Plat 55, and the scattered wetlands as the relevant parcel. The only links between the two plats identified by the trial court are: 1) they are connected by the 323 foot strip of land owned by Lost Tree and therefore "undoubtedly contiguous," and 2) both currently are held with the "usage objective[ ] . . . to sell for profit the lots" on each plat. *Id.* at 434. Similarly, the scattered wetlands are only linked to Plat 57 by their geographic location within the gated community of John's Island. Here, 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. *Lucas*, 505 U.S. 1003, 1017 n.7; *Loveladies*, 28 F.3d at 1180 (holding relevant parcel excludes 6.4 acres of previously-developed uplands purchased in same transaction as regulated parcel and owned by claimant when § 404 permit was denied).

After a careful review of the entire record, this court determines that the relevant parcel is Plat 57 alone. The trial court's factual findings support the conclusion that Lost Tree had distinct economic expectations for each of Plat 57, Plat 55, and its scattered wetland holdings in the vicinity. Because the Court of Federal Claims erred in its determination of the relevant parcel, this court reverses the judgment and remands for further proceedings. On remand, the court first should determine the loss in economic value to Plat 57 suffered by Lost Tree as a result of the Corps' denial of the § 404 permit, and then apply the appropriate framework to determine whether a compensable taking occurred. In determining the loss in value to Plat 57, the court may revisit the property values it adopted in the course of determining the impact of the Plat 57 permit denial on Lost Tree under its definition of the relevant parcel. *See Lost Tree*, 100 Fed. Cl. at 437-38.

IV.

For the reasons set forth above, the judgment of the Court of Federal Claims is reversed and remanded for further proceedings.

REVERSED AND REMANDED

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-117L

LOST TREE VILLAGE CORPORATION, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Filed: Mar. 14, 2014

OPINION AND ORDER

LETTOW, Judge.

This remanded takings case focuses on a determination of the economic value of the previously defined relevant parcel. Plaintiff, Lost Tree Village Corporation ("Lost Tree") sought a wetlands fill permit from the U.S. Army Corps of Engineers ("the Corps") for a 4.99 acre tract of land ("Plat 57") bordering a cove on the Indian River in east central Florida. Lost Tree claims that the denial of that permit eliminated all economically viable use of Plat 57 and constituted a taking in contravention of the Takings Clause of the Fifth Amendment to the United States Constitution. After a trial, the court previously ruled that the relevant parcel for the takings analysis encompassed Plat

57 and a nearby tract, Plat 55, along with scattered wetlands still owned by Lost Tree in a residential community known as John's Island. *See Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 430-35 (2011) ("*Lost Tree I*"), *rev'd and remanded*, 707 F.3d 1286 (Fed. Cir. 2013) ("*Lost Tree II*"). Based on that ruling, the court found that the permit denial resulted in a non-compensable diminution in value of the relevant parcel and directed judgment for the government. *Lost Tree I*, 100 Fed. Cl. at 439. On appeal, the Court of Appeals for the Federal Circuit held that the relevant parcel for purposes of the takings analysis consisted of Plat 57 alone, not also neighboring Plat 55 and the scattered wetlands owned by Lost Tree. *Lost Tree II*, 707 F.3d at 1294. The court of appeals remanded for a "determin[ation of] the loss in economic value to Plat 57 suffered by Lost Tree as a result of the Corps' denial of the . . . permit, and then appl[ication of] the appropriate framework to determine whether a compensable taking occurred." *Id.* at 1295. Specifically, the court of appeals indicated that "[i]n determining the loss in value to Plat 57, the [trial] court may revisit the property values it adopted in the course of determining the impact of the Plat 57 permit denial on Lost Tree under its definition of the relevant parcel." *Id.*

FACTS

A. John's Island

Lost Tree was a land-development enterprise that entered into an option agreement in 1968 ("1968 Option Agreement") to purchase approximately 2,750 acres of

property on the mid-Atlantic coast of Florida in Indian River County. *Lost Tree I*, 100 Fed. Cl. at 415. Various parcels of land were subject to the 1968 Option Agreement, including: (1) land on an unnamed barrier island on the Atlantic Coast, which is bisected by U.S. Highway A-1-A, (2) a westerly peninsula of the barrier island known as the "Island of John's Island" bordering the Indian River, (3) various other islands in the Indian River, including McCuller's Point, Gem Island, Pine Island, Sister Island, Hole-in-the-Wall Island, Fritz Island, and others, (4) submerged lands in and around the Indian River, (5) a "North Acreage" consisting of approximately 100 acres on the Indian River north of the barrier island, and (6) approximately 35 acres about five miles due west of Gem Island, known as the "West Acreage." *Id.*

Lost Tree began exercising its options in 1969 and continued to acquire parcels in a piecemeal fashion until 1974. *Lost Tree I*, 100 Fed. Cl. at 415. As part of its last acquisition, Lost Tree purchased Gem Island and the Island of John's Island, which included the land now comprising Plat 57. *Id.* Although the 1968 Option Agreement included a provision calling for an overarching land development plan, that provision was never enforced, and no master plan has since been discovered. *Id.* at 415-16. Beginning in 1969, and continuing for a number of years, Lost Tree developed on a seriatim basis, through the recording of approximately 56 distinct plats, roughly half of the property covered by the 1968 Option Agreement. *Id.* at 416. Those plats, totaling approximately 1,300 acres, ultimately became the greater part of a gated residential community known as "John's Island." *Id.*

As the court previously noted, "Lost Tree, however, never owned all of the property encompassed by the gated community, and most knowledgeable people in the area would consider the community of John's Island to be inclusive of parcels which were neither covered by the 1968 Option Agreement nor ever owned by Lost Tree." *Id.* Lost Tree built the majority of the roads within the community and was responsible for the development of the infrastructure for the community. *Id.*

In August 1980, Lost Tree submitted to the Corps an application for a wetlands fill permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and a comparable permit application to the State of Florida's Department of Environmental Regulation. *Lost Tree I*, 100 Fed. Cl. at 416. Attendant to the permit applications, Lost Tree submitted a "Development Plan" for the Island of John's Island and Gem Island (the "1980 Development Plan"). *Id.* The 1980 Development Plan "propose[d] the creation of some 200 single family residences on about 400 acres of land." *Id.* (internal citations omitted) (alteration in original). This development plan included several drawings, including one in which a substantial portion of Plat 57 was shaded in green and labeled as a wildlife preserve. *Id.* at 417. The 1980 Development Plan, however, was effectively withdrawn when Lost Tree submitted a revised permit application in an effort to appease Florida's Department of Environmental Regulation. *See id.* The revised application deleted "all originally proposed project features" except a bridge and its approaches. *Id.* Accordingly, no distinct development plan for Plat 57 was ever recorded. Throughout the 1980s and early 1990s,

Lost Tree received several Section 404 permits to continue developing its property. *See id.* at 417-18. In exchange, it recorded various conservation easements in favor of the local, state, and federal governments. *Id.* at 418. The development of Stingaree Point, the peninsula of the Island of John's Island on which Plat 57 lies, began in November 1985. *Id.* During development, a road was built and water and sewer service lines were stubbed out to plats neighboring Plat 57, but not to Plat 57 itself. *Id.*

In 1994, Lost Tree hired new management with the intention of shifting the business from land development to commercial real estate. *See Lost Tree I*, 100 Fed. Cl. at 418. As part of its new focus, Lost Tree sought to rid itself of residual land it owned in and near John's Island, land on which it continued to pay taxes but from which it received no revenue. *See id.* At this point, the parties agree that Lost Tree had no plans to develop the land constituting Plat 57. *Id.* at 423-24. 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." *Id.* at 423 (internal citations omitted).[1] In early 2002, Lost Tree learned that another developer had applied for a wetlands fill permit for a property south of Plat 57 and had proposed certain improvements to a mosquito control impoundment at McCuller's Point as mitigation for that permit. *Id.* at 424.

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[1] The pepper species, *Schinus terebinthifolius*, is an invasive shrub or small tree that is native to Brazil and can irritate the skin in a manner akin to poison ivy. *Lost Tree I*, 100 Fed. Cl. at 423 & n.19.

Lost Tree owned half of McCuller's Point, and as the owner of adjacent land, it was asked to approve any mitigation on McCuller's Point. *Id.* Lost Tree withheld approval, seeking permitting credits in exchange for the improvements that would be made. *Id.* To take advantage of these potential credits, Lost Tree sought the various permits and approvals required to develop Plat 57, believing that of its remaining land holdings, Plat 57 showed the most developmental promise. *See id.* at 424-25.

In August 2002, Lost Tree submitted an application to the Town of Indian River Shores requesting approval for the preliminary plat, among other things, and it submitted a permit application to the Corps for a Section 404 permit. *Lost Tree I*, 100 Fed. Cl. at 424-25. The town approved Lost Tree's application, and Lost Tree obtained appropriate zoning and all other local and state permits and approvals necessary to move forward with development. *Id.* at 425. In August 2004, however, the Corps denied the Section 404 permit because "less environmentally damaging alternatives were available to [Lost Tree] and the project purpose ha[d] already been realized through the development of home-sites within the subdivision." *Id.* (internal citations omitted) (alterations in original). The Corps acknowledged that if an applicant other than Lost Tree had sought the permit, it would have been granted. *Id.*

The parties agree that without the permit, Plat 57 has a nominal value, not reflective of any economic use, but with the permit, Plat 57 is worth a substantial amount. Lost Tree's appraisal expert, Mr. Peter Armfield, testified that it would be worth $25,000 without the permit and

$4,285,000 with the permit. *See* DX 134 (at ninth and tenth unnumbered pages).[2] The government's appraiser, Mr. John Underwood, testified that it would be worth $30,000 without the permit, *see* DX 136 at 48, and $3,910,000 with the permit, *id.*; *see also Lost Tree I*, 100 Fed. Cl. at 425-26.

B. The Post-Trial Decision

Defining the relevant parcel was the key issue for decision in this case. The government sought to include all of the land acquired by Lost Tree pursuant to the 1968 Option Agreement, while Lost Tree sought to limit the relevant parcel to Plat 57. *Lost Tree I*, 100 Fed. Cl. at 430. Following a seven-day trial, this court determined that for purposes of a takings analysis, whether under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the relevant parcel included Plat 57, Plat 55 (a developed, nearby plat still owned by Lost Tree), and several scattered wetlands still owned by Lost Tree within the community of John's Island. *Lost Tree* I, 100 Fed. Cl. at 435, 437. Because of temporal considerations, the court excluded the properties that had been previously developed and sold by Lost Tree some years previously. *See id.* at 433. The value of Plat 55 was significant to the takings analysis, and the court determined that the permit denial for Plat 57 diminished the value of the defined relevant parcel by approximately 58.4%. *Id.* at 437. The court held that "[t]his degree of diminution plainly d[id] not constitute the type of total economic

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[2] The government's trial exhibits are cited as "DX__."

wipeout that constitutes a categorical taking under *Lucas*." *Id.* Accordingly, the court proceeded by applying the *Penn Central* factors to determine whether the resulting partial regulatory taking was compensable. *Id.* at 437-39.

In applying the *Penn Central* factors, the court determined that the character of the governmental action tended to favor Lost Tree because the Corps treated Lost Tree more adversely than it would have treated another applicant, and the value of the wetlands had been significantly reduced by prior mosquito-control actions. *Lost Tree I*, 100 Fed. Cl. at 438-39. The court found that the investment-backed expectations factor was virtually in balance with no weighting in favor of either side. *Id.* Lost Tree possessed very general expectations for the Island of John's Island and Gem Island when it purchased those tracts in making the last acquisition under the 1968 Option Agreement and it had generated specific expectations for Plat 57 beginning in 2001 or 2002, but those expectations were subject to the existing regulatory regime. *Id.* at 438. "Lost Tree's expectations were not objectively unreasonable given the adventitious projected development at McCuller's Point by The Estuary [the entity proposing the unrelated project that required mitigation], coupled with the facts that Lost Tree had property on the Point that was readily available for wetland improvement, *i.e.*, removal of a previously installed mosquito control project, and the State supported the project." *Id.* Ultimately, the court found the economic impact factor to be dispositive. "A diminution in value of 58.4% due to the regulatory action is insufficient to give rise to a taking

despite the weight of the other *Penn Central* factors." *Id.* at 439.

C. The Appellate Decision

Lost Tree appealed this court's decision, and the Federal Circuit reversed and remanded. *Lost Tree II*, 707 F.3d at 1288. The Federal Circuit held that the relevant parcel was Plat 57 alone. *Id.* at 1294. The court placed particular emphasis on the "'economic expectations of the claimant with regard to the property.'" *Id.* at 1293 (quoting *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005)). It explained that "even when contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner develops distinct parcels at different times and treats the parcels as distinct economic units." *Id.* (internal citations omitted). The Federal Circuit concluded that Lost Tree had neither considered nor prepared Plat 57 for developments in the same way it had prepared the other portions of the John's Island community. *Id.* Plat 55, for example, had water and sewer lines stubbed out to it years prior to the events at issue, while Plat 57 did not. *Id.* at 1294. In so deciding, the court of appeals affirmed this court's factual findings, stating among other things that they "support the conclusion that Lost Tree had distinct economic expectations for each of Plat 57, Plat 55, and its scattered wetland holdings in the vicinity." *Id.* On remand, the Federal Circuit directed this court to

> determine the loss in economic value to Plat 57 suffered by Lost Tree as a result of the Corps' denial of the [Section] 404 permit, and then apply the ap-

> propriate framework to determine whether a compensable taking occurred. In determining the loss in value to Plat 57, the court may revisit the property values it adopted in the course of determining the impact of the Plat 57 permit denial on Lost Tree under its definition of the relevant parcel.

Lost Tree II, 707 F.3d at 1295.

Following receipt of the mandate, this court requested that the parties indicate whether they were prepared to adduce additional evidence regarding valuation. Order of July 22, 2013, ECF No. 139. Lost Tree declined to submit any additional evidence, asserting that the existing trial record contains sufficient evidence regarding Plat 57's fair market value with and without a permit. Joint Status Report at 1-2 (Aug. 26, 2013), ECF No. 142. The government, on the other hand, suggested that additional evidence would be helpful to flesh out a new valuation theory, taking into account a prospective buyer's uncertainty about whether a Section 404 permit would be granted. *Id.* at 5-6. After addressing whether it was either timely or appropriate for the government to pursue a new valuation theory in place of the approach it had taken at trial, Hr'g Tr. 12:3 to 13:22 (Sept. 10, 2013),[3] the court permitted the government to provide an evidentiary proffer explaining its proposed new evidentiary approach. Hr'g Tr. 21:4-8. Thereafter, Lost Tree submitted a Motion for Judgment on the Record,

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[3] Subsequent citations to the hearing conducted on September 10, 2013, will omit the date.

Pl.'s Mot. for Judgment on the Record ("Pl.'s Mot"), ECF No. 145, and the government filed a Cross-Motion for Judgment on the Record, Def.'s Cross-Mot. for Judgment on the Record ("Def.'s Cross-Mot."), ECF No. 146. A proffer accompanied the government's cross-motion. *See* Def.'s Cross-Mot. Ex. A (Unsworn Decl. of John R. Underwood, Jr. (Nov. 19, 2013)) ("Unsworn Underwood Decl."), ECF No. 146-1. Briefing was completed on January 17, 2014, and a hearing was held on January 23, 2014. The case is ready for disposition.

STANDARDS FOR DECISION

In deciding this case on remand, the court is bound by the mandate from the Federal Circuit and by its own prior findings in this case that are consistent with the Circuit's decision and mandate. In that connection, "[t]he law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988)). The doctrine rests upon the important public policy that "[n]o litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time." *Gindes v. United States*, 740 F.2d 947, 949 (Fed. Cir. 1984) (internal citation and quotation omitted) (alteration in original). The mandate rule "dictates that 'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *Banks*,

741 F.3d at 1276 (quoting *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948)). This rule applies "to issues 'actually decided, either explicitly or by necessary implication'" by the appellate court. *Id.* (quoting *Toro Co. v. White Consol. Indus., Inc.*, 383 F.3d 1326, 1335 (Fed. Cir. 2004)). Three exceptions can, if applicable, cause the law-of-the-case doctrine and the more specific mandate rule to be overcome. These exceptions appertain when: "(1) subsequent evidence presented at trial was substantially different from the original evidence; (2) controlling authority has since made a contrary and applicable decision of the law; or (3) the decision was clearly erroneous 'and would work a manifest injustice.'" *Id.* (quoting *Gindes*, 740 F.2d at 950).

In its mandate in this case, as previously noted, the Federal Circuit required this court to "determine the loss in economic value to Plat 57 suffered by Lost Tree as a result of the Corps' denial of the [Section] 404 permit." *Lost Tree II*, 707 F.3d at 1295. Specifically, the court of appeals indicated that "the court may *revisit* the property values it adopted in the course of determining the impact of the Plat 57 permit denial." *Id.* (emphasis added).

Lost Tree contends that in these proceedings on remand, the court should focus on the property values, noting that except for this court's conclusion respecting the relevant parcel, all other findings and conclusions made in the post-trial decision were accepted and adopted by the court of appeals. *See* Pl.'s Mot. at 9-12; *see also* Pl.'s Reply in Support of Mot. for Judgment ("Pl.'s Reply") at 2-3, ECF No. 149. The government, on the other hand, urges the court fully to reopen the record, reconsider all

of the takings factors, and render judgment in its favor. *See* Def.'s Reply in Support of its Cross-Motion for Judgment ("Def.'s Reply") at 2-5, 16, ECF No. 150. Both parties appear to agree that the court has discretion to reopen the record insofar as the valuation of Plat 57 is concerned. *See* Pl.'s Mot. at 10 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and *Enzo Biochem, Inc. v. Calgene, Inc.*, 188 F.3d 1362, 1379-80 (Fed. Cir. 1999)); Def.'s Reply at 6 (citing *Enzo Biochem*, 188 F.3d at 1379-80, and *State Indus., Inc. v. Mor-Flo Indus. Inc.*, 948 F.2d 1573, 1577 (Fed. Cir. 1991)).[4]

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[4] In their briefing, both parties cite and quote extensively from the Federal Circuit's decision in *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, 101 Fed. Appx. 818 (Fed. Cir. 2004). Relying on that decision as a precedent is contrary to Federal Circuit Rule 32.1(c)-(d), which in effect bars reliance on nonprecedential dispositions issued by the Federal Circuit or its predecessor before January 1, 2007, except where necessary for claim preclusion, etc. *Compare Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 750-51 (Fed. Cir. 2012) (admonishing appellant for citing as precedent a case affirmed via Federal Circuit Rule 36 because it was a nonprecedential decision issued in 2000), *and Nash v. United States Postal Service*, 345 Fed. Appx. 560, 561 (Fed. Cir. 2009) (declaring that a nonprecedential decision issued before 2007 was "not citable" pursuant to Federal Circuit Rule 32.1(c)), *with Beres v. United States*, 104 Fed. Cl. 408, 454 n.42 (2012) (noting that Federal Circuit Rule 32.1 "makes no provision regarding the citation of nonprecedential dispositions issued before [2007]"), *and Distributed Solutions, Inc. v. United States*, 104 Fed. Cl. 368, 386 n.26 (2012) (citing an unpublished case from the Federal Circuit issued prior to 2007 as nonprecedential pursuant to Federal Circuit Rule 32.1(d)).

The parties' dispute about the scope of the court's ability to reopen the record centers on those factual findings that were made in *Lost Tree I*, reviewed and accepted by the court of appeals in *Lost Tree II*, and formed a basis for the Circuit's decision to overturn only this court's determination regarding the relevant parcel and remand for a determination of economic loss respecting Plat 57. Ordinarily, those questions that were considered by the appellate court and accepted, or not disturbed, in connection with the appellate court's decision may not be reconsidered absent applicability of one of the exceptions to the mandate rule. *Banks*, 741 F.3d at 1276 (citing *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)); *see also Banks*, 741 F.3d at 1278 ("*Banks II* did not 'leave open' the issue of when [p]laintiffs' claims accrued. The *Banks II* court held that the complaints were not barred by the six-year statute of limitations. Necessary and predicate to the holding was a finding that the mitigation efforts delayed claim accrual."). In those areas covered by the remand, however, the question of whether the record should be reopened turns on the extent to which the existing record was sufficiently developed to permit the necessary specific findings to be made upon remand. *See Purex Corp. v. Procter & Gamble Co.*, 664 F.2d 1105, 1109 (9th Cir. 1981).

TAKINGS PRINCIPLES

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Takings cases generally fall into one of two categories—those accomplished by a physical invasion of

the property contrasted to those that arise as a result of a regulatory imposition. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *see also Lucas*, 505 U.S. at 1014-15; *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004). Where the government takes physical possession of private property, it must compensate the owner. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *Bass Enters.*, 381 F.3d at 1365 (internal citations omitted). When the government regulates the permissible use of a property, however, any resultant loss in value is not necessarily compensable. *See Tahoe-Sierra*, 535 U.S. at 322-24.

A categorical duty to provide compensation to the owner who has suffered a regulatory taking arises only in the "extraordinary circumstance" where "*no* productive or economically beneficial use of land is permitted." *Lucas*, 505 U.S. at 1017 (emphasis in original); *see also Tahoe-Sierra*, 535 U.S. at 330. "A property owner must suffer a literal total loss in value to trigger liability on the part of the government for a categorical taking." *Lost Tree I*, 100 Fed. Cl at 427 (citing *Lucas*, 505 U.S. at 1019 n.8, and *Tahoe-Sierra*, 535 U.S. at 330). On the other hand, if the regulation "fall[s] short of eliminating all economically beneficial use, a taking nonetheless may have occurred," *Palazzolo*, 533 U.S. at 617, and the court looks to three factors to guide its inquiry: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action," *Penn Cent.*, 438 U.S. at 124.

While these factors provide "important guideposts," "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances." *Palazzolo*, 533 U.S. at 634, 636 (O'Connor, J., concurring); *see also Tahoe-Sierra*, 535 U.S. at 321 (whether a taking has occurred "depends upon the particular circumstances of the case"); *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (regulatory takings claims "entail[] complex factual assessments").

ANALYSIS

In its decision, the court of appeals left open whether the criteria of *Lucas* or *Penn Central* should be applied, dependent upon the evidentiary record respecting economic loss. *See Lost Tree II*, 707 F.3d at 1295. Because the relevant parcel has been redefined, the court must reevaluate the economic loss of the permit denial with Plat 57 alone as the relevant parcel, and then determine whether a compensable taking occurred.

A. *Lucas*

While per se rules are disfavored in takings law, a subset of regulatory takings are categorically compensable "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Lucas*, 505 U.S. at 1015. A total loss of economically beneficial use is required. *See Tahoe-Sierra*, 535 U.S. at 330 (affirming that a diminution in value of 95% would not constitute a categorically compensable taking) (citing *Lucas*, 505 U.S. at 1019 n.8).

In this instance, the inquiry is whether Plat 57 retains any economically beneficial use without a Section 404 permit. Both parties submitted appraisals for Plat 57. The government's appraiser, Mr. Underwood, testified that Plat 57 was worth $30,000 without the permit. *Lost Tree I*, 100 Fed. Cl. at 426. Lost Tree's expert, Mr. Armfield, valued the plat similarly at $25,000. *Id.* at 425-26. Mr. Armfield concluded that without the permit the property is "relegated to basically a wetland parcel with little or no economic use except at nominal levels that may be related to nuisance value or environmental use which typically does not support significant economic value except in support of mitigation activities in development of other lands." DX 134 (at tenth unnumbered page). Mr. Underwood testified that the highest and best use of Plat 57 without a permit was as "passive recreation," which he described as "a place that human beings can go for relaxation, they can go to enjoy nature." Tr. 1008:10-17.[5] Due to the minimal difference between the parties' estimates and general agreement on Plat 57's highest and best use without a permit, the court will simply take the average of the parties' estimates. Thus, the court finds that the value of Plat 57 without a permit is $27,500.

The parties agree that the highest and best use of Plat 57, had a fill permit been issued, would be for a single family home, the use for which it is zoned. *See* DX 136 at 2; DX 134 (at ninth unnumbered page). Mr. Underwood engaged in a multi-step process to arrive at a valuation for Plat 57 with a permit. DX 136 at 45. Based on a sales-

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[5] Citations to the transcript of the trial are to "Tr.__."

comparison approach, he concluded that Plat 57, if developed, would sell for approximately $1,875,000 per upland acre, for a rounded total of $4,720,000. *Id.*[6] Because Plat 57 was not yet developed, Mr. Underwood applied a number of deductions. *Id.* at 46. The chief deduction was the cost of construction work on the mitigation area at McCuller's Point and the different type of work necessary to prepare Plat 57 as a home site. *Id.* at 45. He considered the construction cost estimate prepared by Mr. Melchiori of On-Site Management Group of $489,612. *Id.*; *see also* DX 134 (at 15th unnumbered page) (Melchiori's John's Island Plat 57 Construction Estimate). That estimate encompassed the actual construction work needed for the distant mitigation area, the preparatory work on Plat 57, and miscellaneous surveying, engineering, legal, and other incidental fees. *See* DX 134 (at 15th unnumbered page). Mr. Melchiori's estimate also included a 10% contingency allowance for each category of these costs. *Id.* Mr. Underwood additionally took into account a review of Mr. Melchiori's estimate by James M. Hudgens of CZR Incorporated, which yielded an estimate of $501,712. DX 136 at 45. Mr. Underwood ultimately concluded that construction costs should be estimated at $500,000. *Id.* He made further deductions based on an "environmental risk"[7] and an "underestima-

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[6] Mr. Underwood considered that 2.5183 upland acres would be present at Plat 57 as developed. DX 136 at 45.

[7] Mr. Underwood defined environmental risk in terms of the work to be accomplished at the distant mitigation area, specifically the "risk . . . that environmental conditions could damage the wetlands and affect the validity of the mitigation plan and cause the five year

tion risk," for a combined deduction value of 15% of the construction cost, *i.e.*, an additional $75,000 in deductions. *Id.* In addition, Mr. Underwood specified a cost associated with a developer "assuming the time and risk of undertaking the entire project," which he referred to as "entrepreneurial incentive" and quantified at 5% of the plat's value as developed. *Id.* at 46. He lowered it from a typical 10% or 15% because Lost Tree had obtained all the other required permits for the development. *Id.* Thus, Mr. Underwood deducted $575,000 (construction costs and "risk" deductions) and $236,000 (entrepreneurial incentive) from $4,720,000 (estimated value of Plat 57 as developed) to reach a valuation for Plat 57 of $3,910,000. *Id.*

The plaintiff's expert, Mr. Armfield, also used a land sales comparison approach, but concluded that Plat 57 as developed would have an estimated market value of $4,800,000. DX 134 (at ninth unnumbered page). Similarly to Mr. Underwood, Mr. Armfield provided a series of deductions to account for construction costs and development risks. *Id.* Mr. Armfield relied solely on Mr. Melchiori's construction estimate of $489,612 for development costs. *Id.* Mr. Armfield deducted an additional $25,000 to account for an "incentive for a buyer to accept the risk and work associated with seeing the job to completion." *Id.* Overall, Mr. Armfield concluded that Plat 57, as permitted but not developed, would have an estimated market value of $4,285,388. *Id.*

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monitoring plan to restart and necessitate cures from moderate to replanting the entire wetland." DX 136 at 45.

Until their most recent briefs, both parties operated under the assumption that the appropriate economic measures were the value of Plat 57 with a permit and the value of Plat 57 without a permit. The government now attempts to displace its expert's trial testimony to this effect in favor of a new theory for valuing the economic impact of the permit denial. *See* Def.'s Cross-Mot. at 17. On remand, the government contends that the appropriate measures are (1) the value of Plat 57 the moment before the Section 404 permit was denied, thus encompassing the uncertainty of whether a permit would be granted, and (2) the value of Plat 57 without a permit. *Id.* at 16-19. Such an argument necessarily would require reopening the evidentiary record to accept new evidence regarding the new proposed value of Plat 57 the moment before the permit was denied. Lost Tree opposed introduction of the new valuation theory on the grounds that: (1) the existing evidence was more than adequate for valuation purposes, (2) the government should not be allowed to change theories on remand, and (3) the government's new theory was conceptually invalid. Pl.'s Mot. at 7-12. The court permitted the government to file an evidentiary proffer to "address[] [its] theory and explain why the proffer should be accepted." Hr'g Tr. 21:4-8.

The proponent of an evidentiary proffer must "express[] precisely the substance of the excluded evidence to inform both the trial court and the appellate court why exclusion of the evidence" might be prejudicial error. *Polack v. Commissioner*, 366 F.3d 608, 612 (8th Cir. 2004) (internal citation and quotation omitted) (alteration in original). The materials submitted by the government,

namely, its cross-motion and the accompanying unsworn declaration by Mr. Underwood, do not provide enough specificity to constitute an evidentiary proffer and fail to persuade the court to reopen the record.

Mr. Underwood's one-page narrative declaration is limited to setting forth the types of materials he would need to consider to value Plat 57 under the "new hypothetical condition" that a permit had been applied for but that no decision had yet been made by the Corps. Unsworn Underwood Decl. Mr. Underwood neither undertook any actual analysis nor did he provide the court with specific numbers obtained through application of this new valuation theory. Additionally, he did not state with certainty that numbers could be ascertained from sources available to appraisers. *See id.* These types of deficiencies have led courts to find similar proffers inadequate for purpose of appellate review of evidentiary rulings pursuant to Fed. R. Evid. 103. *See*, *e.g.*, *Inselman v. S & J Operating Co.*, 44 F.3d 894, 896 (10th Cir. 1995) (rejecting offer of proof because plaintiffs failed to examine witness and establish that he would testify as they believed); *Gates v. United States*, 707 F.2d 1141, 1145 (10th Cir. 1983) (affirming that merely telling the court the content of a witness's proposed testimony is not an offer of proof); *see also Perkins v. Silver Mountain Sports Club and Spa, LLC*, 557 F.3d 1141, 1147 (10th Cir. 2009) (evidentiary proffer requires more than "merely telling the court of the content of . . . proposed testimony" (internal quotations and citations omitted)); *cf.*, *Fox v. Dannenberg*, 906 F.2d 1253, 1255, 1257 (8th Cir. 1990) (accepting a proffer where counsel stated with specificity the anticipated tes-

timony of the excluded expert even though counsel did not put the proffered witness on the stand). Rule 103(a)(2) requires a party to preserve a claim of error resulting from an evidentiary ruling excluding evidence by "inform[ing] the court of its substance by an offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2). If a party does not submit an adequate offer of proof, a reviewing court may only take notice of a "plain error affecting a substantial right," a more stringent level of review. Fed. R. Evid. 103(e).

In this instance, the proffer submitted by the government does not provide the court with enough substantive detail to determine the probative value of the evidence. Nor has the government provided any explanation for its failure to pursue its new theory earlier. Both parties previously submitted evidence regarding the proper valuation of Plat 57, and the government has failed to demonstrate why the court should displace its expert's prior testimony with a second valuation of Plat 57 performed in a quite different way.

Even if the court were to find the government's proffer to be adequate, the proposed alternative valuation method has no merit. The government may not lower the fair market value of Plat 57 by relying on the possibility of the very taking at issue. Prior attempts by the government to make this argument have been rejected by the Federal Circuit and this court's predecessor. Specifically, in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 156 & 156 n.5 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994), the plaintiffs asserted that the highest and best use for the disputed property was as a prepared site for a 40-lot

residential development and submitted an appraisal assuming such development. The government attacked the plaintiff's appraisal as "inadequate because it d[id] not account for a possibility that all permits would not be obtained, a factor by which a knowledgeable buyer would discount his purchase price." *Id.* at 156. In response to the government's argument that the plaintiffs lacked the "*very permit approval by the Army Corps of Engineers that is at issue in this case*," *id.* (emphasis in original), the trial court recalled a similar argument made before the Federal Circuit in *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (1986), stating, "This argument is reminiscent of defendant/appellant's argument in *Florida Rock*[,] to which the Federal Circuit responded, 'We suppose appellant added this contention to provide a little humor for an otherwise serious and scholarly brief, and say no more about it.' 791 F.2d at 905. Neither shall this court," *Loveladies Harbor*, 21 Cl. Ct. at 156 n.5.

Valuing Plat 57 in accord with its fair market value at its "highest and best use,"[8] meaning with a Section 404 permit or absent the regulatory scheme entirely, is consistent with prior precedent. *See, e.g.*, *Brace*, 72 Fed. Cl. at 350 (citing *Olson v. United States*, 292 U.S. 246, 255 (1934)), *aff'd*, 250 Fed. Appx. 359 (Fed. Cir. 2007); *Walcek v. United States*, 49 Fed. Cl. 248, 261-265 (2001) ("[T]he

[8] Highest and best use has been defined as "'[t]he reasonably probable and legal use of [property], which is physically possible, appropriately supported, financially feasible, and that results in the highest value.'" *Brace v. United States*, 72 Fed. Cl. 337, 350 (2006) (quoting *Loveladies Harbor*, 21 Cl. Ct. at 156) (alterations in original)), *aff'd*, 250 Fed. Appx. 359 (Fed. Cir. 2007).

denominator of the economic value fraction must be the value of the entire [p]roperty, unencumbered by wetlands regulations."), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002); *Loveladies Harbor*, 21 Cl. Ct. at 157 This is especially true in this case because, except for the Section 404 permit denial, Plat 57 feasibly could have been put to its highest and best use and it had obtained all of the other necessary permits and approvals.

Accordingly, the court will determine the economic impact of the permit denial according to the evidence previously submitted by both parties at trial, which presumed the relevant economic pinpoints were Plat 57 without a permit compared to Plat 57 with a permit and put to its highest and best use as a single family lot. The parties' experts' opinions are relatively close in value. Mr. Underwood estimated the fair market value of Plat 57 as developed would be $4,720,000, while Mr. Armfield estimated it as $4,800,000. The values are very close and the court sees no reason to favor one over the other, so it will split the difference. Thus, the court finds that the value of the Plat 57 as developed is $4,760,000.

The next step is evaluating the proper deductions for construction costs to find the value of Plat 57 as permitted, but not developed. The court finds that Mr. Melchiori's construction estimate of $489,612.07 is reliable. Because this estimate already includes a 10% contingency allowance for all costs, including mitigation area construction and lot preparation, the court will not also apply Mr. Underwood's additional deduction of 15% of the construction costs to account for an "environmental risk" or an "underestimation risk." Both experts applied a de-

duction to account for a cost associated with convincing an owner or entrepreneur proceeding with the project to accept the risk of development. Mr. Underwood calculates this risk as approximately 5% of the value of the plat as developed, *i.e.*, $236,000. DX 136 at 46. Mr. Armfield calculates this as approximately 5% of the costs of construction, *i.e.*, $25,000. DX 134 (at ninth unnumbered page). The court has already noted that Mr. Underwood's entrepreneurial incentive of $236,000 is excessive, *see Lost Tree I*, 100 Fed. Cl. at 437 n.33, and finds that Mr. Armfield's "entrepreneurial incentive" based on the estimated cost of construction is a more appropriate deduction. Consequently, the court finds that the fair market value of Plat 57 as permitted is $4,245,387.93.

In conclusion, the court finds that the diminution of value, from $4,245,387.93 (value of Plat 57 as permitted and ready for preparation for use as a site for a home) to $27,500 (nominal value of Plat 57 without permit), is $4,217,887.93, or approximately 99.4%. Such a diminution of value constitutes a categorical taking under *Lucas*, particularly because the assigned valuation without a permit is a nominal amount that does not reflect any economic use.[9]

B. *Penn Central* Factors

For completeness, the court will also apply its findings of fact to the *Penn Central* framework. No need exists

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[9] Plat 57 does have some environmental value as a wetland, but that value has been reduced by the mosquito abatement measures undertaken decades previously, which left isolated hummocks and some stagnant eutrophic pools.

for the court to reconsider its prior findings regarding the first two factors, *viz.*, the character of the governmental action and investment-backed expectations. The government has failed to demonstrate why it should be permitted to reargue these factors on remand. The law-of-the-case doctrine supports the court's decision not to reopen these findings. None of the three generally accepted exceptions apply here—no new evidence has been presented and accepted by the court; no controlling authority has rendered a contrary and applicable decision of law; and the prior decision was not clearly erroneous. *See Gindes*, 740 F.2d at 950. Indeed, the court of appeals examined and approved this court's prior findings regarding these factors. *See, e.g.*, *Lost Tree II*, 707 F.3d at 1294 ("The trial court's factual findings support the conclusion that Lost Tree had distinct economic expectations for each of Plat 57, Plat 55, and its scattered wetland holdings in the vicinity."). For context, the court will briefly describe its prior findings on the first two *Penn Central* factors before reanalyzing the economic impact factor in light of its findings on remand.

1. Character of the governmental action.

"The character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition." *Lost Tree I*, 100 Fed. Cl. at 438 (quoting *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003)). The Clean Water Act has a governmental objective of preserving the nation's waterways and wetlands. *Lost Tree I*, 100 Fed. Cl. at 438. In this case, however, the court was persuaded that the

Corps singled out Lost Tree for adverse treatment. Testimony at trial demonstrated that had a different applicant requested a permit, the Corps would have responded favorably to the application. Moreover, the court doubted the Corps' contention that Plat 57 was a "high-quality" wetland due to "the trenching and mounding that had occurred on Plat 57 for mosquito-control purposes . . . and also the Town's and state court's findings that the wetlands involved were marginal." *Id.* at 439 (internal citations omitted). In sum, the court found that this factor weighs in favor of Lost Tree. *Id.*

2. Reasonable investment-backed expectations.

The regulatory regime in place at the time property is acquired is relevant to the determination of reasonable investment-backed expectations, but the existence of a regulatory regime does not preclude a reasonable expectation that a permit could be obtained. *See Lost Tree I*, 100 Fed. Cl. at 437-38 (citing *Palazzolo*, 533 U.S. at 633). In its prior decision, the court found that Lost Tree had developed overarching, unspecific development expectations when it acquired Gem Island and the Island of John's Island, including the portion that eventually became Plat 57, and that by 2001 or 2002, Lost Tree had developed investment-backed expectations specifically for Plat 57, but that those expectations were subject to the regulatory climate at the pertinent times. *Id.* at 416, 438. The court also concluded that Lost Tree's expectations were not unreasonable, given that "the adventitious projected development at McCuller's Point" was going

to provide development credits and that it had obtained all other required local permits and approvals. *Id.* at 438. This factor does not weigh in either party's favor. *Id.* at 439.[10]

3. Economic Impact.

"When considering *Penn Central's* economic impact factor, a court must 'compare the value that has been taken from the property with the value that remains in the property.'" *Maritrans*, 342 F.3d at 1358 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). As the court has previously described, a diminution in value of 99.4% resulted from the Corps' action, and that degree of diminution weighs very strongly in Lost Tree's favor under the *Penn Central* factors.

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[10] The government extensively argued in its cross-motion that Lost Tree did not have reasonable investment-backed expectations for Plat 57 because it did not develop a distinct development plan for that tract until around 2002. *See* Def.'s Cross-Mot. at 19-25. The government asserts that an investment-backed expectation must exist at the time of purchase, and Lost Tree could not have had a reasonable investment-backed expectation at that time because the effects of the Clean Water Act were well-known to all. *Id.* at 20-23. This argument has no merit. It reiterates points raised without success in connection with the original trial, ignores the effect of the adventitious development at McCuller's Point, and fails to take account of the Federal Circuit's explicit approval of this court's findings on the subject.

C. Synopsis

In accord with the Federal Circuit's mandate, the court has revisited the economic value of Plat 57 to determine whether a compensable taking occurred. In that connection, both Lost Tree and the government were invited to adduce new evidence of valuation. Lost Tree rested on the record established at the trial, while the government sought to displace its valuation evidence admitted at trial in favor of a factually inadequate evidentiary proffer that also rested on an inappropriate theory. The record evidence shows the potential fair market value of Plat 57 with a Section 404 permit, reflecting its highest and best use, as well as its current fair market value without a permit. The fair market value of Plat 57 with a permit would be $4,245,387.93, and its current fair market value without a permit is $27,500. The resulting 99.4% diminution in value effected a compensable categorical taking under *Lucas*. An analysis under the *Penn Central* framework leads to the same result, *i.e.*, that a compensable taking occurred.

D. Interest

"'If the [g]overnment pays the owner before or at the time the property is taken, no interest is due on the award[,] . . . [b]ut if disbursement of the award is delayed, the owner is entitled to interest thereon.'" *Arkansas Game and Fish Comm'n v. United States*, 87 Fed. Cl. 594, 646 (2009) (quoting *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984)), *aff'd after remand from the Supreme Court*, 736 F.3d 1364 (Fed.

Cir. 2013). The interest awarded should be "sufficient to ensure that [the owner] is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Kirby Forest Indus.*, 467 U.S. at 10 (citing *Phelps v. United States*, 274 U.S. 341, 344 (1927) and *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 306 (1923)). "The interest awarded by the court ought to emulate 'what a reasonably prudent person' would have received had he or she invested the funds to produce a reasonable return while maintaining safety of principal." *National Food & Beverage Co. v. United States*, 105 Fed. Cl. 679, 704 (2012) (internal citations omitted). In this respect, the court regards the ten-year Treasury STRIPS rate as appropriate. *See id.*[11] STRIPS reflect minimal risk because they are government-based securities and ten years is a reasonable approximation of the duration between the taking, which occurred in August 2004, and the date of judgment. STRIPS are "zero coupon" securities, and thus compounding is built into this financial instrument. *See id.*

CONCLUSION

For the stated reasons, the court finds that the Corps' denial of the Section 404 permit application for Plat 57 has effected a taking of Lost Tree Village Corporation's property. The court awards Lost Tree

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[11] The acronym STRIPS stands for "Separate Trading of Registered Interest and Principal of Securities." *See STRIPS*, Treasury Direct, https://www.treasurydirect.gov/instit/marketables/strips/strips.htm (last visited Mar. 14, 2014).

$4,217,887.93, as measured by the fair market value of Plat 57 with a Section 404 permit minus the nominal value of Plat 57 without a permit. The court awards interest on that amount at the ten-year Treasury STRIPS rate from August 2004 to the date the judgment is actually paid.

Final judgment to this effect shall be entered under Rule 54(b) of the Rules of the Court of Federal Claims because there is no just reason for delay. The clerk shall issue judgment in accord with this disposition.

After all proceedings respecting this judgment have been completed, the court will address attorneys' fees and expenses under Section 304(c) of the Uniform Relocation Assistance and Real Property Acquisition Act, 42 U.S.C. § 4654(c).

It is so ORDERED.

/s/ CHARLES F. LETTOW
CHARLES F. LETTOW
Judge

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-117L

LOST TREE VILLAGE CORPORATION, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Filed Under Seal: Aug. 19, 2011
Reissued: Aug. 26, 2011

OPINION AND ORDER[1]

LETTOW, Judge.

This post-trial decision concerns an alleged taking by the government of property for public use without providing just compensation to the property owner. Plaintiff, Lost Tree Village Corporation ("Lost Tree")

[1] Because this opinion and order might have contained confidential or proprietary information within the meaning of Rule 26(c)(1)(G) of the Rules of the Court of Federal Claims ("RCFC") and the protective order entered in this case, it was initially filed under seal. The parties were requested to review this decision and to provide proposed redactions of any confidential or proprietary information on or before August 26, 2011. No redactions were requested; several minor corrections were made.

sought a wetlands fill permit from the U.S. Army Corps of Engineers ("Corps") for a 4.99 acre tract of land ("Plat 57") bordering a cove on the Indian River in east central Florida. Lost Tree claims that the denial of that permit eliminated all economically viable use of Plat 57 and constituted a taking in contravention of the Takings Clause of the Fifth Amendment to the United States Constitution.

At the outset of the litigation, determination of the relevant parcel emerged as the key issue of the case. Previously, the court considered and denied a motion for partial summary judgment by Lost Tree and a cross-motion for partial summary judgment by the government respecting the relevant-parcel question. *See Lost Tree Village Corp. v. United States*, 92 Fed. Cl. 711, 722 (2010). A site visit to the property was conducted on January 31, 2011. Thereafter, a seven-day trial on liability and damages was held, first in Washington, D.C. from April 4 to 7, 2011, and then in Fort Pierce, Florida, from April 11 to 13, 2011. Post-trial briefing has been completed, and on July 21, 2011, the parties presented their respective closing arguments. The case is accordingly ready for disposition.

FACTS[2]

A. *Lost Tree Village Corporation*

Lost Tree Village Corporation was started in 1959 in Florida by Mr. E. Llwyd Ecclestone. Am. Stip. of Fact for Trial ("Stip.") ¶¶ 1-2.[3] Mr. Ecclestone guided Lost Tree until his death in 1981, at which point his daughter, Mrs. Helen Ecclestone Stone, became Chairman of the Board. Tr. 757:17-20, 759:16-20 (Stone). Today, Mrs. Stone remains the Chairman of the Board and is the majority shareholder of Lost Tree, holding 93.6% of its shares. Tr. 756:8-10 (Stone); Stip. ¶ 4. The remaining interest in Lost Tree is divided into Subchapter S holdings for Mrs. Stone's two daughters, Mrs. Margaret B. Schaffer and Mrs. Sheila Biggs. Stip. ¶ 4. In 1994, Charles Bayer became the President of Lost Tree, and since that time he has been responsible for all business and financial operations of the company, including day-to-day management. *Id.* ¶ 5.

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[2] The recitation of facts constitutes the court's principal findings of fact in accord with RCFC 52(a). Other findings of fact and rulings on mixed questions of fact and law are set out in the analysis.

[3] Citations to the transcript of the trial are to "Tr.__." Citations to the transcript of the closing argument are to "Cl. Tr. __." Plaintiff's exhibits are cited as "PX__," and the government's exhibits are cited as "DX__."

Stipulations of fact were initially filed by the parties in connection with their cross-motions for partial summary judgment. *See Lost Tree*, 92 Fed. Cl. at 712 n.2. Amended stipulations were submitted by the parties in conjunction with the trial.

B. *The 1968 Option Agreement*

Initially, Lost Tree operated as a land-development enterprise focused on land located near North Palm Beach. It then looked northward. In October 1968, Lost Tree entered into an option agreement (the "1968 Option Agreement" or the "Option Agreement") with the descendants of Fred R. Tuerk, which agreement permitted Lost Tree to purchase through the exercise of a series of separate options approximately 2,750 acres of property on the mid-Atlantic coast of Florida in Indian River County. Stip. ¶ 7; PX 1 (1968 Option Agreement). The lands subject to the Option Agreement were located in the general area of the Town of Indian River Shores, near the City of Vero Beach, and were comprised of numerous parcels, many of which were not contiguous to the largest tract. More specifically, the Option Agreement covered: (1) land on an unnamed barrier island ("Barrier Island") on the Atlantic Coast, which land is bisected by U.S. Highway A-1-A, (2) a westerly peninsula of the Barrier Island known as the "Island of John's Island" bordering the Indian River, (3) various other islands in the Indian River, including McCuller's Point, Gem Island, Pine Island, Sister Island, Hole-in-the-Wall Island, Fritz Island, and others, (4) submerged lands in and around the Indian River, (5) the "North Acreage" consisting of approximately 100 acres on the Indian River north of the Barrier Island, and (6) approximately 35 acres about five miles due west of Gem Island, known as the "West Acreage." Stip. ¶¶ 9, 83. The Option Agreement separated the parcels into nine conveyances, *i.e.*, Conveyances "A" through "I." *Id.* ¶ 10.

In February 1969, Lost Tree exercised the first of its options. Stip. ¶ 12. That option covered Conveyances "A" and "B," which conveyances related to the Barrier Island. *Id.* ¶ 21. Between February 1970 and August 1974, Lost Tree exercised five additional options to acquire the remaining property covered by the 1968 Option Agreement. *Id.* ¶ 13. The last exercised option related to Conveyance "C," which encompassed various parcels of land, including the Island of John's Island and Gem Island, an island in the Indian River to the northwest of the Island of John's Island. *Id.* ¶¶ 28, 31. Plat 57 lies on the north side of Stingaree Point, a smaller peninsula on the west side and at the southern end of the Island of John's Island. *Id.* ¶ 30; DX 50 (Map reflecting generally accepted boundaries of the community of John's Island).

The 1968 Option Agreement included a provision calling for "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." PX 1 at LTVC015300 (1968 Option Agreement). The call for a development plan was rooted in the desire of Mr. Tuerk, Lost Tree's counterparty to the Option Agreement, "to have a say, and to make sure that his land and his town w[ere] going to be developed beautifully." Tr. 95:6-8 (Bayer). However, Mr. Tuerk died prior to the closing of the Option Agreement, and Mr. Tuerk's heirs did not share his views on the necessity of a development plan. *See* Tr. 99:19-22, 94:20-24 (Bayer). No plan such as the one contemplated by the Option Agreement nor any plan for developing all of the property covered by the Option Agreement has

been found. Stip. ¶ 17. Sometime after 1994, Lost Tree conducted an "exhaustive search" to find an overall development or master plan,[4] which search was ultimately fruitless Tr. 93:13 to 99:22 (Bayer).[5]

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[4] This investigation was undertaken because the Town of Indian River Shores had sent to Lost Tree a letter requiring Lost Tree to cease its operation of the administration building in the community of John's Island within ten years because such building had a commercial use but was located in a residential zone. As part of its defense to that action, Lost Tree sought to find a master plan that would have allowed it to persist in its pre-existing non-conforming use. Tr. 95:21 to 97:9 (Bayer). After Lost Tree conducted its search for such a plan, and Mr. Bayer questioned numerous knowledgeable people of the Town of Indian River Shores, including Mr. Sherman Smith, a lawyer involved in the negotiations leading up to the Option Agreement, Lost Tree concluded that no development plan existed. Tr. 93:5 to 97:21, 98:17-19, 99:2-22 (Bayer).

[5] A 2001 appraisal done by Mr. Peter Armfield, a real estate appraiser in Florida, for Lost Tree in regards to three lots on a tract on the Island of John's Island, Plat 55, states, "John's Island was established in 1969 and is a private 1,650 acre residential community, whose master plan limits the overall development to 1,382 residential properties, or one unit per acre when John's Island is completed." DX 100 ("An Appraisal of Three Single Family Lots Located Along Stingaree Point in John's Island, Town of Indian River Shores, Florida" (Oct. 24, 2001)) at LTVC017503. When questioned about the "master plan" to which Mr. Armfield was referring, Mr. Armfield testified that he had never seen such a master plan, and he could not identify from where he learned that there was a master plan or that John's Island would be completed once 1,382 homes were built. *See* Tr. 663:11 to 664:19 (Armfield).

C. *Development of the Community of John's Island*

Beginning in 1969, and continuing for many years, Lost Tree developed on a seriatim basis, through the recording of approximately 56 distinct plats, roughly half of the property covered by the Option Agreement. Stip. ¶ 18. Those approximately 1,300 acres ultimately became a gated residential community known as "John's Island." *Id.* Lost Tree, however, never owned all of the property encompassed by the gated community, and most knowledgeable people in the area would consider the community of John's Island to be inclusive of parcels which were neither covered by the 1968 Option Agreement nor ever owned by Lost Tree. *Id.* ¶¶ 19-20; *see* DX 50. Nonetheless, Lost Tree built the majority of the roads within the community and was responsible for the development of the infrastructure for the community. Tr. 266:17 to 267:13 (Bayer).[6]

Lost Tree first developed part of the Barrier Island, recording that property as "John's Island Plat 1" with the Town of Indian River Shores in March 1969. Stip. ¶¶ 21-23. The initial development on Barrier Island consisted of a golf course and cottages, condominiums,

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[6] The community of John's Island has a homeowners' association known as the John's Island Property Owners Association ("JIPOA") to which over 90% of the homeowners in the community belong. Stip. ¶ 124. JIPOA, an entity unaffiliated with and not controlled by Lost Tree, provides security services, maintenance of common areas, architectural review of properties, and runs the golf courses in the community. *Id.* ¶¶ 126, 131-32, 136-38. Membership in JIPOA is detached from property ownership in the community, requiring separate application. *Id.* ¶ 138.

and homes. *Id.* ¶ 23. Lost Tree also developed infrastructure for the Barrier Island property, including streets, utilities, sewage systems, and a sewage treatment facility. *Id.* ¶ 22. Lost Tree continued to develop Barrier Island throughout the 1970s and up to the mid-1980s, eventually adding two golf courses, a beach club, golf cottages, a private hotel facility, and about 800 individual dwelling units. *Id.* ¶ 24. In the course of its development, Lost Tree recorded approximately 45 different plats on the Barrier Island, such plats covering mostly single-family homes. *Id.* ¶ 25.

In the late 1970s, Lost Tree turned its attention to the Island of John's Island and Gem Island. The first plat on the Island of John's Island, Plat 25, was filed in May 1980. Stip. ¶ 33. Shortly thereafter, in August 1980, Lost Tree submitted to the Corps an application (the "1980 Permit Application") for a permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and a comparable permit application to the State of Florida's Department of Environmental Regulation. *Id.* ¶¶ 44-45. Attendant to the permit applications, Lost Tree submitted a "Development Plan" for the Island of John's Island and Gem Island. *Id.* ¶ 34; PX 33 (the "1980 Development Plan"). The 1980 Development Plan "propose[d] the creation of some 200 single family residences on about 400 acres of land." *Id.* ¶ 40.

Along with technical proposals, the 1980 Development Plan stated more generally, "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. . . . " Stip.

¶ 39. The Plan represented also that "[t]he development is 90% in existing upland areas requiring no governmental regulatory agency permitting [and] [p]rotection of some 35.37 acres of existing mangrove islands is proposed as per John Island's Preservation Society agreement and . . . Lost Tree Village Corporation." Stip. ¶ 40. No agreement between the John's Island Preservation Society and Lost Tree has been found, *id.* ¶ 42, and "it appears that the Preservation Society was never formed." *Lost Tree*, 92 Fed. Cl. at 714. However, several drawings were attached to the 1980 Development Plan, including one in which a substantial portion of what much later became Plat 57, among other areas, was shaded in green and labeled a "wildlife preserve." Stip. ¶ 35.[7]

In the 1980 Permit Application, Lost Tree sought approval for numerous infrastructure improvements, including the construction of causeways, one to connect Barrier Island to the Island of John's Island, and one to connect, along with a bridge, Gem Island to the Island of John's Island. Stip. ¶ 43. The Application addressed as well the placement of culverts on the Island of John's Island to permit water flow, the placement of fill in some wetland areas on the Island of John's Island to create developable lots, and the dredging of various canals in wetland areas around the Island of John's Island, including a U-shaped canal that would be located at the southwest-

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[7] Another drawing accompanying the Public Notice associated with the 1980 Permit Application labels a significant portion of Plat 54 (discussed *infra*, at 11) as a "wildlife preserve" and another portion of Plat 54 as "an out parcel not to be platted as a plot." Stip. ¶ 59.

erly point of the Island of John's Island near Chambers Cove, an arm of the Indian River bordering Plat 57. *Id.* ¶¶ 43, 47. Among other things, these improvements were intended to "interconnect the John's Island Development [on the Barrier Island] with the Island of John's Island . . . and Gem Island," *id.* ¶ 37, as well as to provide waterfront access for lots.

On January 20, 1982, Lost Tree received a letter from the State of Florida notifying it of changes to the 1980 Permit Application that would be required to gain approval. Stip. ¶ 48. Although the Corps determined by the Spring of 1982 that it would approve the application, it could not do so without approval or waiver by Florida. *Id.* ¶¶ 49-50. Ultimately, the Corps never acted upon the 1980 Permit Application as submitted in its original form. *Id.* ¶ 53.

On August 2, 1982, Lost Tree submitted to the Corps a revised proposal, including drawings depicting Lost Tree's proposed alterations to the 1980 Permit Application. Stip. ¶¶ 54-55. The new application reflected various changes from the 1980 Permit Application, including, among other things, the elimination of the proposed causeway and bridge to Gem Island, the reduction of wetlands fill, and the deletion of three proposed canals, including the U-shaped canal near Chambers Cove. *Id.* ¶ 54. Additional revised plans submitted October 1, 1982 stated that "all originally proposed project features are being deleted from this application except the bridge from John[']s [Island] to Gem Island and its approaches." PX 122 (1982 Permit (Dec. 7, 1982)) at ID00485. On December 7, 1982, the Corps issued a permit to Lost Tree which

did not approve the bridge but rather approved the following structural changes: (1) construction of the causeway connecting Barrier Island to the Island of John's Island;[8] (2) installation of a 4,000-foot canal with a bottom width of 68 feet; and (3) removal of an earthen plug at the southern tip of the Island of John's Island to separate that isthmus from the Barrier Island and allow flushing of water in John's Island Sound. Stip. ¶ 57; PX 122 at ID00417-42 (1982 Permit).

Development of the Island of John's Island and Gem Island proceeded throughout the 1980s and 1990s, and was accomplished by approximately 21 different plats, all of which contained lots for single-family homes. Stip. ¶ 32. In 1983, Lost Tree received a permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, allowing the installation of a causeway and bridge to connect the Island of John's Island and Gem Island, *id.* ¶¶ 61, 62, 64, 65, and in 1993, Lost Tree received a Section 404 permit for the construction of a second canal on the north end of the Island of John's Island, *id.* ¶ 67. During this period of development, various parcels were also reserved as conservation easements by deed restrictions recorded by Lost Tree in favor of the local, state, or federal government. *See*, *e.g.*, Tr. 221:14 to 222:12 (Bayer) (recounting a conservation easement granted in connection with ap-

[8] The purpose of the causeway was to "provide[] 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." Stip. ¶ 70.

proval for Plat 46 pursuant to a 1983 permit); Tr. 222:13-22 (Bayer), Tr. 418:12 to 419:19 (Test. of Steven Melchiori, who provided surveying and civil engineering services to Lost Tree) (both recounting a conservation easement granted in connection with approval for Plat 53 pursuant to a 1993 permit).

Development of Stingaree Point, the westerly peninsula of the Island of John's Island on which Plat 57 lies, began in November 1985 with the recording of Plat 40, which plat was comprised of six lots on the south and east side of the Point. Stip. ¶ 71. Access to the lots on Plat 40 "was provided by a new road constructed roughly up the center line of the Point, called Stingaree Point Road." *Lost Tree Village*, 92 Fed. Cl. at 715. Attendant to the development of Plat 40, in 1985, Lost Tree also installed water and sewer lines and "stubbed out" the lines to the six lots of Plat 40. Stip. ¶ 102.[9] The lots on Plat 40 were sold and homes were built on those properties within a few years of the recording. Stip. ¶ 71. Also in 1985, Lost Tree stubbed out water and sewer service to a tract at the southeastern end of Stingaree Point, which tract was eventually recorded as Plat 55 in 1998. Stip. ¶ 103. Such services were not then extended to then-unplatted area that later became Plat 57, and to date, Lost Tree has never stubbed out those services to Plat 57. *Id.*

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[9] All infrastructure must be completed on a parcel or a developer must post a bond for 115 percent of the engineer's estimate for the cost of the improvement before a parcel may be recorded as a plat in the Town of Indian River Shores. Tr. 411:13-21 (Melchiori).

An April 30, 1986 appraisal entitled "John's Island Remaining Real Estate and Related Assets" evaluated the status of development of John's Island and Stingaree Point at that time. PX 56. The appraisal stated: "A project-by-project budget for all remaining development costs to complete John's Island is contained in Exhibit D." *Id.* at LTVC0013490. Page 5 of Exhibit D to the appraisal, 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." *Id.* at LTVC013533; *see also* Tr. 238:2 to 240:16 (Bayer) (concurring with the 1986 appraisal's opinion that Stingaree Point was substantially completed as of April 1986). The exhibit to the appraisal does not mention Plat 57.

In 1989, Lost Tree recorded all 40 lots on Gem Island as Plat 52, PX 68 (Copy of Plat 52), and began selling those lots to individual home builders in 1990. Stip. ¶ 75. Subsequent to the recording of Plat 52, Lost Tree recorded two plats apart from Plat 57 inside the community of John's Island: Plat 53, recorded in 1993, was a replatting on the Barrier Island which divided an existing lot, PX 72 (Copy of Plat 53); Tr. 1379:22 to 1380:1 (Melchiori), and Plat 55, recorded in 1998, PX 81 (Copy of Plat 55); Tr. 132:15-22 (Bayer).

D. *The Operations of Lost Tree Village from 1994 Onward*

In 1994, Lost Tree hired Mr. Bayer as its President. Stip. ¶ 81. Mrs. Stone stated that she hired Mr. Bayer

"[b]ecause [Lost Tree had] finished development, and [it] was looking for new investments of different varieties . . . [m]ainly commercial real estate." Tr. 756:14-20. Mr. Bayer concurred in this assessment of Lost Tree's new focus, stating that he "was brought on to take the company in a new direction, new investments." Tr. 82:6-7; *see also* Tr. 371:11-16 (Bayer) ("[Mrs. Stone] wanted to buy office buildings. . . . [S]he basically wanted me to take the company in another direction."). Mr. Bayer pursued Lost Tree's new focus by "invest[ing] a fair amount of stocks and bonds into real estate investments, triple net leased office buildings around the country, where [Lost Tree] would buy a building that was leased to [a company] . . . and had very little management involvement . . . and collect the rent." Tr. 83:20 to 84:1.

Mr. Bayer described the state of Lost Tree's business at the time of his arrival in 1994 as quiescent. When Mr. Bayer joined Lost Tree, the company had two employees: Frankie Faulkner, who served as a secretary and accountant, and Mrs. Stone. Tr. 106:20-22; Stip. ¶ 159.[10] Mr. Bayer testified that developmental activities inside the community of John's Island were "done," and Lost Tree's developmental operations had ceased in reality "[f]ive years earlier than [his] arrival." Tr. 106:23 to 107:2; *see also* Tr. 83:7-9 (Bayer) ("[T]he actual involvement of Lost Tree Village Corp. with the community had

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[10] The state of Lost Tree's work force in 1994 stands in contrast to Lost Tree's prior employment of approximately 250 people in 1980. Stip. ¶ 159.

ceased 4 or 5 years before I showed up."); Tr. 106:3-4 (Bayer) (testifying that the last road was built and last utility stubbed out in 1989). Mr. Bayer elaborated, "There was no business at all really. The business had been effectively shut down. So [Lost Tree wasn't] in the business of real estate development. They weren't in any business. They were a landowner." Tr. 107:9-14; *see also* Tr. 83:12 (Bayer) ("They were basically doing nothing [at the time of his arrival]."); Tr. 391:2, 392:2-14 (Melchiori) (Lost Tree's development work in the community of John's Island was "[b]asically completed" in 1995 and infrastructure development had been completed "probably three or four years, five years prior to that . . . around 1990").[11]

At this time, Lost Tree was experiencing negative cash flow and the shareholders were paying Lost Tree's expenses out of their personal funds, with payments needed for real estate taxes, insurance, and other expenses associated with Lost Tree's ownership of residual properties in Indian River County. Tr. 370:5-8 (Bayer); Tr. 82:9-11

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[11] Mrs. Stone stated that although in her opinion development was not yet done in John's Island in 1994, Lost Tree had "got out of the development business in 1995." Tr. 772:17-22; *see also* Tr. 786:6-16 (Stone) (identifying the sale of Lost Tree's remaining platted lots to Gem Island Investment L.P. in 1995 as marking the end of development operations for Lost Tree). Mrs. Stone testified in her deposition as well that she currently considered Lost Tree in the property development business "in part" in regards to John's Island, but at trial she clarified that she was unsure of this answer, stating that she is not aware of the operations of Lost Tree's business activities because Mr. Bayer runs all aspects of the company. *See* Tr. 776:19 to 777:24.

(Bayer) ("[Lost Tree] was about a million dollars a year in negative cash flow."); Tr. 84:7-11 (Bayer) (Lost Tree's remaining property was "eating cash quite quickly, because [Lost Tree] basically had to pay taxes and insurance on it, and it wasn't generating any income.").

In 1995, Lost Tree hired Ms. Laura Zerbock to establish an accounting department to support Lost Tree's changed business purpose. Ms. Zerbock joined Lost Tree as Vice President but her title changed to Chief Financial Officer once she received her license as a certified public accountant. Tr. 802:24 to 803:4. Ms. Zerbock testified at trial as to her understanding of Lost Tree's purpose in hiring her: "We were taking the company in a new direction. We were buying commercial buildings, and I was hired to set up an [a]ccounting [d]epartment and move the company financially in the direction where we were going to create a cashflow stream to Helen Stone and her daughters." Tr. 805:16-22; *see also* Tr. 803:11-16 (Zerbock) ("We were moving in a new direction. We were buying commercial buildings throughout the country, and I was analyzing potential commercial properties."); Tr. 808:3-7 (Zerbock) (Lost Tree intended to utilize funds generated from the sale of residual properties to buy commercial buildings). As for the state of Lost Tree's development operations at the time of her arrival, Ms. Zerbock stated that "[a]s far as [she] was concerned, the chapter [of Lost Tree's development operations] had already been closed [and] [she] was hired to start the new chapter." Tr. 831:7-14; *see also* Tr. 830:24-25 (Zerbock) (Lost Tree was "no longer in the business of development" in 1995.).

Upon her arrival in 1995, Ms. Zerbock effected the change of Lost Tree's Standard Industrial Classification ("SIC") on its federal tax return from real estate development to miscellaneous real estate. Lost Tree then adopted a method of tax accounting that was not permissible for real estate developers. *See* Tr. 805:24 to 807:11 (Zerbock) (testifying that the changes in Lost Tree's tax status and accounting methods were initiated because Lost Tree was "no longer in the business of development, and [it] w[as] in the business of buying commercial buildings"); Tr. 843:6-23 (Zerbock) ("[T]o me[,] the implication [of changing the SIC code] was huge in that it was we were no longer in the business of development; that we were going to be purchasing properties and buying up commercial buildings."); *see also* Tr. 107:20 to 109:22 (Bayer) (explaining in detail Lost Tree's former and new method of accounting).[12] The Internal Revenue Service subsequently audited Lost Tree in 2000, and the Service

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[12] As explained in *Lost Tree*:

> Prior to 1996, in accordance with [S]ection 262(a) of the Internal Revenue Code, Lost Tree had capitalized infrastructure costs, employee and office overhead, and other development costs that benefitted multiple lots and added an allocated share of those costs to the tax basis of property Lost Tree sold. Subsequent to its change of business purpose, Lost Tree treated its operational costs as an expense, which would not have been permissible for a company in the business of developing and selling real property.

92 Fed. Cl. at 715 n.10 (internal quotation marks and citation omitted).

upheld Lost Tree's new practices. Tr. 108:25 to 109:1 (Bayer).

As president, Mr. Bayer was tasked with stopping Lost Tree's negative cash flow, investing in new cash-flowing investments, Tr. 82:10-11, 83:16-18 (Bayer), and ultimately "get[ting] [Lost Tree and Mrs. Stone] out of . . . John's Island," Tr. 370:12-14 (Bayer). In this regard, Mr. Bayer testified that Mrs. Stone "wanted Lost Tree Village Corp. essentially shut down. She didn't want to have anything to do with employees, or activities, or risk, and so we sold off all the remaining plat[t]ed lots." Tr. 84:21 to 85:4, 370:20-22 (Bayer) (stating that Mrs. Stone was "finished, and she wanted to sort of extricate herself of all involvement with the community"). Thus, Mr. Bayer set out essentially to "liquidat[e] the corporation to the extent that [he] could," Tr. 112:11-12 (Bayer), by "pursu[ing] the sale or other disposition of property that Lost Tree still owned" in and around the Indian River area. Stip. ¶ 83; *see also* Tr. 84:12-13 (Bayer) ("I quickly decided to dispose of everything that [Lost Tree] had that wasn't producing cash."); Tr. 829:16 to 831:12 (Zerbock) (testifying as to Lost Tree's objective to dispose of the remaining properties left on the balance sheet). Describing her impression of Lost Tree's treatment of its residual properties at this time, Ms. Zerbock stated that the remaining parcels were "like dead wood that we were trying to clean up and get rid of." Tr. 808:13-14; *see also* Tr. 830:25 to 831:1 (Zerbock) (The remaining properties Lost Tree possessed were "all just like leftover noise that [Lost Tree] w[as] not really focused on.").

To dispose of Lost Tree's remaining properties, however, Mr. Bayer first had to determine what Lost Tree actually still owned. Mr. Bayer testified, "[T]he first thing is that I had to find out what we owned. When I showed up, nobody really knew what physically the company owned. . . . I spent really weeks and months figuring out what the company owned." Tr. 87:22-24, 88:14-15; *see also* Tr. 89:5-8 (Bayer) ("I am getting all these tax bills . . . , and I had no idea what they were for, or what they related to."). To assist him in the task of uncovering Lost Tree's remaining properties, Mr. Bayer hired Mr. Steven Melchiori on a consulting basis in the fall of 1995. Tr. 88:20-25 (Bayer); Tr. 446:19 to 447:6 (Melchiori).

Mr. Melchiori is a professional surveyor and mapper, Tr. 386:21, and a principal in a construction management company in Vero Beach, known as Onsite Management Group. *See* Tr. 386:10-13, 390:8-9 (Melchiori). Formerly, Mr. Melchiori worked for an engineering firm that handled surveying and civil engineering tasks associated with the development of John's Island from 1981 to 1987, and Mr. Melchiori personally handled many of those plat development projects. *See* Tr. 387:6-8, 388:3-4 (Melchiori). Mr. Melchiori concurred with Mr. Bayer's account of Lost Tree's affairs as of his hiring in 1995, stating that he "d[id]n't believe that anybody who was working there at the time really had any idea . . . where the property was and what it entailed." Tr. 447:10-14.

Using his own recollection and by consulting tax bills for prior years, Mr. Melchiori, in conjunction with Mr. Bayer, was able to determine what properties Lost Tree

owned as of 1995, *see* Tr. 89:3-12 (Bayer), and he created a list of all of Lost Tree's known properties. *See* PX 74 (1995 List of Lost Tree Properties); Tr. 447:21 to 448:13 (Melchiori). The 1995 List revealed that Lost Tree owned remaining properties both inside and outside of the community of John's Island. Within the community of John's Island, Lost Tree had "[n]ot much [land], . . . just scattered pieces here and there," Tr. 452:1-2 (Melchiori), apart from a number of remaining unsold lots on Plat 52 on Gem Island. *See* PX 74 (1995 List). Outside the community of John's Island, Lost Tree's principal remaining properties consisted of: (1) the West Acreage; (2) the North Acreage, and (3) the Lost Tree Islands, consisting of approximately 500 acres on scattered islands in the intercoastal waterway. *See* Stip. ¶ 83; PX 74 (1995 List); PX 120 (Map reflecting generally-accepted boundaries of community of John's Island).

With the 1995 list in hand, Mr. Bayer determined the order and manner of disposition of the residual properties by "look[ing] at each parcel and figur[ing] out what [he] should do with it, and how to maximize how much money [Lost Tree] w[as] going to get for it." Tr. 104:4-7 (Bayer); *see also* Tr. 451:2-15 (Melchiori) (testifying that he would assist Mr. Bayer in evaluating the properties Lost Tree owned and that Mr. Bayer decided "what if anything to do with them"). Because the larger parcels had the most significant tax bills, Lost Tree focused on selling the more substantial properties first. *See* Tr. 117:21-25 (Bayer).

Mr. Bayer first disposed of the remaining substantial parcel within the community of John's Island, namely Plat 52, which in 1995, Lost Tree sold to Gem Island Invest-

ment L.P. in a bulk sale. *See* Stip. ¶¶ 76-77; PX 73 (Deed for Plat 52); Tr. 110:5-9 (Bayer) (recounting how two or three months after he arrived at Lost Tree he arranged the sale of all remaining platted parcels in the community of John's Island to Gem Island Investment L.P.); Tr. 112:16-17 (Bayer).[13] After this transfer, Lost Tree did not own any platted lots within the community of John's Island. Putting aside *de minimis* slivers of property, it owned approximately a dozen unplatted parcels within the community. Those properties consisted of the then-unplatted areas that became Plat 54, Plat 55, and Plat 57, a handful of scattered wetland or mangrove-covered parcels, and undevelopable wetlands. *See* Tr. 452:10 to 456:13 (Melchiori).

Plat 55 was recorded in January 1998 and consists of three lots near the southeastern-most base of Stingaree

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[13] Gem Island Investment L.P. is owned 60% by Mrs. Stone and 20% each by Subchapter S entities for her daughters, Mrs. Shaffer and Mrs. Biggs. Stip. ¶ 76. It was established by Mr. Bayer approximately two to three months subsequent to his arrival at Lost Tree, Tr. 110:5-9, 294:7-14 (Bayer), for the purpose of allowing Mrs. Stone's daughters to get involved in the business, Tr. 116:22-25 (Bayer). Mr. Bayer serves as its president, Tr. 297:20-24 (Bayer), and manages its day-to-day operations, Tr. 299:7-9 (Bayer). Following its creation, Gem Island Investment L.P. purchased other lots in many localities outside Florida. Tr. 294:22 to 295:7 (Bayer). Gem Island Investment L.P. pays Lost Tree $5,000 a month to do its accounting. Tr. 312:23-24 (Bayer). Today, the company does not have active employees and "[i]ts only assets are limited partnership interests in other partnerships." Tr. 298:6-11 (Bayer). By 1999, Gem Island Investment, L.P., had sold the remaining lots on Gem Island. Stip. ¶ 76.

Point. Stip. ¶ 88; PX 81 (Copy of Plat 55). This parcel had been developed and the infrastructure for it laid in 1985 when Stingaree Point was developed. Tr. 133:6-9 (Bayer); Stip. ¶ 103. Lost Tree did not list the property for many years thereafter because of the consistently increasing value of intercoastal property, and the property is now, in Mr. Bayer's view, "worth more than people are willing to pay for it." Tr. 135:3-8, 136:2-11 (Bayer). A 323-foot strip of land lies between Plat 55 and Plat 57. Tr. 1379:7-15 (Melchiori); Stip. ¶ 97. That strip consists largely of a very narrow shoulder to Stingaree Point Road, several feet in width, which drops to water and marsh.[14]

In July 1997, Lost Tree identified as Plat 54 three lots on the small peninsula called Horse's Head, and submitted a Section 404 wetlands fill permit application for this property. Stip. ¶ 89. While the permit application was pending, Lost Tree sold the property to Horse's Head Ltd., and the permit application was amended to reflect that change in ownership. *Id.* ¶ 91; PX 80 (Deed for Plat

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[14] The shoulder of the road is deeded to JIPOA. Lost Tree owns a strip of water and marsh next to the shoulder. The potential utility of that strip was the subject of some testimony during trial. Mr. Melchiori stated that the strip was unusable. *See* Tr. 1379:15-21. He testified also that he "believe[d] you could construct a sidewalk within the current plat of right of way between those two plats, but . . . [y]ou could not put that sidewalk in on property that's owned by Lost Tree Village. The right of way for the road is turned over to [JIPOA]. That's where the sidewalk would have to go." Tr. 1416:9-17.

54).[15] Lost Tree also sold to Horse's Head Ltd. in December 1997 several properties for use as mitigation for the Plat 54 permit, including Hole-in-the-Wall Island, tracts on the north and south causeway, and other islands. Tr. 150:11 to 151:3 (Bayer).

Additionally, during the several years after 1995, Lost Tree sold various buildings and assets associated with the community of John's Island. Lost Tree sold the administration building to the John's Island Club, Inc., Tr. 174:1-11 (Bayer), which sale physically extricated Lost Tree from the community of John's Island, Tr. 173:15-16 (Bayer). In September 1999, Lost Tree sold John's Island Real Estate Company, a real estate brokerage firm owned by Mrs. Stone and trusts for her daughters, that historically had handled most sales of home-site lots in the community of John's Island. Tr. 158:25 to 159:9, 166:15 to 167:7 (Bayer); PX 130 (Deed for the sale of John's Island Real Estate Company).[16]

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[15] Over 85% of the stock of Horse's Head Ltd. was owned in equal shares by the Margaret B. Shaffer Revocable Trust and the Sheila Biggs Revocable Trust, Stip. ¶ 92, with Mrs. Stone owning the remaining shares, Tr. 299:16 to 300:2 (Bayer). Mr. Bayer assisted with its organization. Tr. 299:14-15 (Bayer). Plat 54 was sold to Horse's Head Ltd. at fair market value for $100,000 pursuant to an appraisal Lost Tree commissioned. Tr. 151:4-13 (Bayer). In 2000, Horse's Head Ltd. received a wetlands fill permit from the Corps to fill 2.66 acres of Plat 54, and Horse's Head subsequently sold the platted home sites. Stip. ¶ 93. Horse's Head Ltd. no longer exists today. Tr. 300:12-14 (Bayer).

[16] In March 1998 and August 1998, Lost Tree also sold to a local developer the lots at the Environmental Learning Center ("ELC"),

Respecting the residual properties located outside of John's Island, Lost Tree put the North Acreage and West Acreage properties on the market almost immediately after Mr. Bayer's arrival at Lost Tree in 1994. *See* Tr. 104:1-4, 204:24-25 (Bayer). Lost Tree sold most of the North Acreage in 1999 to a developer which built single-family homes and condominiums on the property. Stip. ¶ 84; PX 89 (Deed conveying North Acreage). In 2004, Lost Tree sold the West Acreage, which originally consisted of approximately 35 acres, together with approximately 190 contiguous acres that Lost Tree had acquired in the 1980s, to Lost Tree Preserve, LLC and that property is currently being developed into a residential community known as Lost Tree Preserve. Stip. ¶ 86.[17] In January 2003, Lost Tree sold the Lost Tree Islands to the City of Vero Beach and the Town of Indian River Shores as part of the resolution of a takings claim against those entities. *Id.* ¶ 85 (citing *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. Dist. Ct. App. 2002)); Tr. 131:12 to 132:10 (Bayer).[18] Lost Tree also sold the smaller residual properties it owned which were outside of the

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which lots are located outside the community of John's Island on the North Acerage. Tr. 138:23 to 139:13, 156:15-22 (Bayer); PX 84 (Deed conveying ELC Lots).

[17] The precise ownership of Lost Tree Preserve, LLC, was not established at trial, but Mr. Bayer manages and directs the activities of that company, along with Mrs. Stone's daughters, Mrs. Shaffer and Mrs. Biggs. Tr. 1376:15-22 (Melchiori).

[18] The takings claim had its genesis in the denial of permits to Lost Tree by the Town of Indian River Shores in 1990 and 1999 for development at the Lost Tree Islands. *See Lost Tree*, 838 So.2d at 566.

community of John's Island. In early 2003, it sold a house it owned on Silver Shores Road, a few miles removed from the John's Island community but closer to the Lost Tree Islands. Tr. 194:14-18, 195:25 to 196:3 (Bayer). Additionally, it sold three parcels on Highway A-1-A in the same vicinity as the Silver Shores Road home. *See* PX 107 (Deed conveying three parcels).

E. *The Advent of Plat 57*

As noted, Plat 57 is located on the Island of John's Island, on the north side of Stingaree Point, and is among the properties acquired by Lost Tree pursuant to the last option exercised under the Option Agreement. Stip. ¶¶ 94, 98. It is located within the gated community of John's Island, *id.* ¶ 133, and access to the plat may only be gained by entrance through one of the gates at the edge of the community of John's Island, which gates Lost Tree constructed but no longer owns. Tr. 265:12-19, 376:7-8 (Bayer). The land constituting 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." Stip. ¶ 99.[19] The ditches and mounds were constructed by the Florida "Mosquito Control" authority, Tr. 178:5-10 (Bayer), and produced a cross-hatched pattern over Plat 57. An aerial photograph of Plat 57 taken in 1960, Tr. 1388:1-2 (Melchiori), is appended

[19] The species of pepper is the Brazilian pepper, *Schinus terebinthifolius*, which can irritate the skin in a manner akin to poison ivy.

as Exhibit A.[20] It consists of 4.99 total acres of land, 1.41 acres of which are submerged lands, and 3.58 acres of which are wetlands with some uplands. Stip. ¶ 95.

Plat 57 is adjacent to other property on the Island of John's Island that was purchased via that same transaction. Stip. ¶ 96. To the east of Plat 57 is a strip of land that is a mosquito control impoundment, which land is separated from the roadway by a utility easement that has been deeded to JIPOA. *Id.* ¶ 97. To the east of the mosquito control impoundment, a 323-foot strip of land divides Plat 57 from Plat 55. *Id.* To the west of Plat 57 is Lot 1 of Plat 40, on which a substantial house was constructed in the 1980s. *Id.* To the north of Plat 57 is the Indian River, specifically the inlet known as Chambers Cove. *Id.* To the south of Plat 57 is Stingaree Point Road, which separates Plat 57 from other lots on Plat 40. *Id.*

The then-unplatted parcel constituting Plat 57 was present on Mr. Melchiori's 1995 list. *See* PX 74 (1995 List) (listing "wetlands north of Lots 1, 2, 4, & 5 Plat 40"); Tr. 516:9-19 (Melchiori) (identifying wetlands on PX 74 as Plat 57 and indicating that such listing meant Lost Tree

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[20] Mosquito impoundments installed at that time consisted of mounds of land that were high and dry, surrounded by ditches that were constantly submerged by some level of water. *See* Tr. 475:21-23 (Melchiori). The creation of the contrasting mounds and ditches was intended to eliminate potential areas of reproduction for the salt-water mosquito, which lays its eggs only in marshy areas. *See* Tr. 471:21-25 (Melchiori). There are at least ten to twelve mounds and multiple ditches on Plat 57. *See* Tr. 475:8-16 (Melchiori).

was aware it owned Plat 57 in 1995). Despite this listing, Mr. Bayer testified that "Lost Tree Village didn't get a tax bill on Plat 57 from like '96 until 2002, 2004. We didn't get a tax bill on it, so it wasn't on anyone's radar screen, and until they went on their tour o[f] what properties did Lost Tree Village Corp[.] own, I didn't know we owned it, and nobody did." Tr. 232:17-23.[21] Mr. Bayer later clarified that if Lost Tree had been assessed taxes on Plat 57 during this period, "it would not have risen to a level" that would have made Lost Tree dispose of the property quickly. Tr. 1423:5-15. Ms. Zerbock testified similarly, stating that the property constituting Plat 57 had not "come up" as a source of discussion for Lost Tree from the time she joined in 1995 until 2002. Tr. 841:15-20.

Mr. Bayer testified that prior to approximately 2001 through 2002, Lost Tree "never considered developing [Plat 57] . . . into a home[]site or anything else." Tr. 234:9-13. Indeed, "[p]rior to 2001-02, property within Plat 57 was sometimes left blank in development maps and plans." Stip. ¶ 108; *see also* Tr. 932:2-16 (Ms. Sadowski, Section Chief of the Cocoa Permit Section, Jacksonville Regulatory Division, U.S. Army Corps of Engineers) (When the 1980 Permit Application was submitted, "[i]t was apparent that Lost Tree did not intend to develop Plat 57 . . . [because] there were no proposed fill im-

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[21] The "tour" Mr. Bayer spoke of refers to a tour taken by either Mr. Melchiori or Bill Kurr, Lost Tree's environmental consultant, in connection with the permit application for Plat 54. Tr. 234:3-8 (Bayer). To the extent Plat 57 has been taxed by the Indian River County Property Assessor, it has been assessed as "a separate parcel." Stip. ¶ 120.

pacts to that plat."). In early 2002, however, Lost Tree learned that a southerly property development, known as "The Estuary," located nearer the Lost Tree Islands than the John's Island community, had applied for a wetlands fill permit for its property and had proposed certain improvements to a mosquito control impoundment at McCuller's Point as proposed mitigation for that permit. Tr. 1403:11-22, 1404:23-25 (Melchiori). McCuller's Point is one of the islands in the Indian River and is located "approximately three-quarters of a mile south of Plat 57." Tr. 463:6-8 (Melchiori). Half of McCuller's Point was purchased by Lost Tree pursuant to the Option Agreement and half was purchased by The Estuary. Tr. 1402:24 to 1403:19 (Melchiori). Because Lost Tree owned half of McCuller's Point and thus was an abutting property owner, its consent was requested for the improvements. Tr. 1403:23-25 (Melchiori).

Initially, Lost Tree withheld its consent because "if [T]he [E]stuary were to improve [its] part of the impoundment, [it] would in effect improve Lost Tree's section of the impoundment, and therefore Lost Tree felt that if . . . somebody is going to improve [its] land, [Lost Tree] should get the benefit, the permitting benefit out of that." Tr. 1410:6-12 (Melchiori); *see also* Tr. 1404:6-14 (Melchiori). That permitting benefit "would have been credits . . . to [be] used for mitigation for a project." Tr. 1410:15-16 (Melchiori). At first, Lost Tree thought to create a mitigation bank, allowing mitigation credits to be used at a future time; however, "the mitigation bank was somewhat complicated, and [The Estuary] suggested that . . . if [Lost Tree] had a site[-]specific

project that [Lost Tree] could use the mitigation for, it would be easier to permit than a[] mitigation bank." Tr. 1404:15-19 (Melchiori); *see also* Tr. 1410:22 to 1411:5 (Melchiori) (testifying that the St. John's River Water Management District also encouraged Lost Tree choose a site-specific project rather than use a mitigation bank).

At that point, Mr. Bayer and Mr. Melchiori "just kind of looked at property that was even remotely possible [to be developed] within John's Island." Tr. 1411:21-22 (Melchiori). Mr. Melchiori stated, "That's basically when [P]lat 57 came about, . . . to utilize that mitigation or that impoundment's mitigation or benefit on a site-specific project, and the project, just looking for something, was [P]lat 57." Tr. 1411:12-15. Mr. Melchiori described how Lost Tree settled on Plat 57 as the proposed site to utilize the McCuller's Point mitigation credit:

> [Plat 57] was the only one that really had road access. There w[ere] a few other pieces, but for various reasons, most of which they didn't have access to roads, were kind of eliminated. And then looking at this one [Plat 57], and knowing that . . . it had been impacted by . . . previous mosquito control, it seemed like a logical site to use.

Tr. 1411:22 to 1412:4. Mr. Bayer then "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." Stip. ¶ 106; *see* PX 99 ("John's Island Plat 57 Construction Estimate" (Oct. 28,

2002)). The financial assessments showed that Plat 57 could be developed profitably; thereafter, Mr. Bayer recommended to Lost Tree that Plat 57 be developed for sale as one or more home sites. Stip. ¶ 107.[22]

"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 . . . , seeking to fill 2.13 acres of wetlands." Stip. ¶ 110. Later that month, on August 23, 2002, Lost Tree submitted an application for a Section 404 wetlands fill permit from the Corps to fill Plat 57. *Id.* ¶ 111. "Most of the [proposed] mitigation for [P]lat 57 was . . . to be done on . . . the property that Lost Tree owned in McCuller[']s Point." Tr. 1412:11-19 (Melchiori). The Town of Indian River Shores approved a preliminary plat for Plat 57 allowing one residential home site, and such approval was conditioned on the Town's use of a portion of the mosquito control impoundment on McCuller's Point. Stip. ¶ 115. Lost Tree obtained "all other local approvals needed and all necessary approvals from the State to develop Plat 57 into a home[]site." *Id.* ¶ 117.[23]

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[22] In this vein, Mr. Bayer testified that property prices in the area of the community of John's Island were increasing rapidly during the time from 2001 through 2004, which potentially made Plat 57 profitable despite the development costs that would be associated with the project. *See* Tr. 234:14 to 236:25.

[23] The Town's approval was challenged in Florida circuit court by third parties on the grounds that the wetlands Lost Tree sought to

On June 28, 2004, Lost Tree submitted additional information to the Corps in support of its application. Stip. ¶ 118. At that time, "the only property still owned by Lost Tree [within the community of John's Island], 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," all of which "had significant obstacles to development," and the only platted property Lost Tree owned within the community of John's Island was Plat 55. Stip. ¶ 118.

The Corps denied the Plat 57 permit application on August 9, 2004, concluding that "less environmentally damaging alternatives were available to [Lost Tree] and the project purpose ha[d] already been realized through the development of home-sites within the subdivision." PX 114 (Plat 57 Denial Letter) at LTVC014016. In denying the permit, the Corps stated also that "[t]he Corps[] believes that the [Lost Tree Village Corporation] has had very reasonable use of its land at John's Island pursuant to prior DA authorizations." *Id.* at LTVC014038; *id.* ("It is clear the applicant has piecemealed his development and that reasonable use of the property has been achieved."). In arriving at this conclusion, the Corps pointed to "[p]revious permits issued to

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fill were not marginal wetlands. Stip. ¶ 116. Lost Tree intervened in the suit as a third-party defendant, and after a three-day bench trial, in February 2004, the court upheld the Town's approvals for Plat 57, concluding that the town's determination that the wetlands were marginal was supported by substantial evidence. *Id.*

[Lost Tree Village Corp] and Horse[']s Head L[td.] includ[ing] the construction of causeways, excavation of canals and the placement of fill for the development of 4 single-family lots [on Plat 54]."[24] *Id.*; *see also* Tr. 941:18 to 942:15 (Sadowski) (confirming the Corps' belief that Lost Tree had enjoyed reasonable use of its land and its project had been completed based on development of the entirety of community of John's Island). Ms. Sadowski testified that if an applicant other than Lost Tree had sought the permit, it would have been granted. Tr. 955:5 to 956:16 (Sadowski).

E. *Valuation of Plat 57*

Mr. Peter Armfield offered expert testimony on behalf of Lost Tree regarding the valuation of Plat 57. Mr. Armfield is a real estate appraiser and President of Armfield Wagner Appraisal & Research, Inc. in Vero Beach, Florida. Tr. 566:16-21. He has approximately 33 years of experience in real estate appraisal, Tr. 572:2, and he holds numerous certifications related to his work as an appraiser, Tr. 566:22 to 569:23. Approximately "99 percent" of his appraisals are performed in Indian River County, and prior to his involvement in this case he had appraised approximately three hundred and fifty properties within the community of John's Island. Tr. 570:22 to 571:2, 573:3-7. Using the appraisal standards set forth in

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[24] The Corps did not explain its reasoning to take account of the permit granted to Horse's Head for Plat 54 in the Plat 57 permit analysis, stating only that "Charles Bayer[,] the current president of [Lost Tree] is also the president of the Horse[']s Head L[td.]." PX 114 at LTVC014038.

the Uniform Standards of Professional Appraisal Practice ("USPAP"), Tr. 575:23-25, Mr. Armfield concluded that the fair market value of Plat 57 as of August 9, 2004 had the permit been granted would have been $4,285,000, and its fair market value at that time without the permit was $25,000. Tr. 580:24 to 581:7; *see* DX 134 (Mr. Armfield's Expert Report).[25]

The government submitted the expert testimony of Mr. John Underwood regarding valuation of Plat 57. Mr. Underwood is a real estate appraiser for Appraisal and Acquisition Consultants, Inc. in Lantana, Florida. He holds numerous licenses, Tr. 991:17-20, 992:8 to 993:12, and has 41 years of experience in appraisal, Tr. 995:8-25. He has conducted approximately 100 appraisals in Indian River County, Tr. 996:8-10, had made numerous appraisals in the community of John's Island during the 1970s, Tr. 996:25 to 997:9 (Mr. Underwood), and had completed over 1,000 wetlands appraisals, Tr. 997:18-20. Employing the USPAP standards, Mr. Underwood concluded that the fair market value of Plat 57 as of August 9, 2004 had the permit been granted would have been $3,910,000, and its fair market value at that time without the permit was $30,000. Tr. 1005:5-20; *see* DX 136 (Mr. Underwood's

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[25] Mr. Bayer offered his opinion in this regard as well, stating that if the permit had been granted to Lost Tree for Plat 57, he would have listed Plat 57 for $5.5 to $6 million, and he expected to sell it for approximately $5.2 million to $5.5 million. Tr. 260:4-12, 262:4-6. He testified also that Plat 57's value "as is" without the permit from the Corps was negative because it does not produce income and Lost Tree is required to pay real estate taxes on the property. Tr. 258:15-20.

Expert Report). Mr. Underwood also appraised other parcels owned by Lost Tree and other entities. *See* DX 137; DX 138.

The government offered the expert testimony of Mr. Christopher Barry at trial as well. Mr. Barry is a partner at PricewaterhouseCoopers, where he has worked for approximately the past 27 years in a forensic services consulting practice. Tr. 1245:5-13, 1249:3-13. Mr. Barry's testimony focused on aggregating the value realized by Lost Tree from development of the John's Island Community with value realized by other companies in which Mrs. Stone or her daughters have a stake, such as Gem Island Investment, L.P., Horse's Head Ltd., and Lost Tree Preserve, LLC. Tr. 1258:6-8; *see* DX 139 at EXP000003 (Expert Report of Mr. Barry) (listing all companies considered in the analysis). Mr. Barry testified that assuming Plat 57 was worth $5.5 million, the economic impact of the loss of that profit would have constituted 3.6% of profits from the community of John's Island, Tr. 1305:20-23, an "insignificant" number when considered with the aggregate revenues realized by Lost Tree and the aggregated companies as a result of development of the community of John's Island. Tr. 1342:10 to 1343:25.

STANDARDS FOR DECISION

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Takings cases generally fall into one of two categories: those accomplished by a physical invasion of

the property or those that arise as a result of a regulatory imposition. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. South Car. Coastal Council*, 505 U.S. 1003, 1014-15 (1992); *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004). Where the government takes physical possession of private property, it must compensate the owner, regardless of whether the property taken constituted the entire parcel or only a part. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *Bass Enters.*, 381 F.3d at 1365.

The law of regulatory takings is more intricate, and finds its genesis in Justice Holmes' familiar statement that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Since *Pennsylvania Coal*, the Supreme Court has provided an analytical framework for determining when a regulation "goes too far." A categorical duty to provide compensation to the owner who has suffered a regulatory taking only arises in the "extraordinary circumstance" where "*no* productive or economically beneficial use of land is permitted." *Lucas*, 505 U.S. at 1017; *see also Tahoe-Sierra*, 535 U.S. at 330. A property owner must suffer a literal total loss in value to trigger liability on the part of the government for a categorical taking. *See Lucas*, 505 U.S. at 1019 n.8; *see also Tahoe-Sierra*, 535 U.S. at 330 ("Anything less than a 'complete elimination of value,' or a 'total loss,'" does not fall within *Lucas*' scope).

If the regulation "fall[s] short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors." *Palazzolo*, 533 U.S. at 617. This analysis is an "essentially ad hoc, factual inquir[y]," in which the court considers particularly: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see also Palazzolo*, 533 U.S. at 617. While these factors provide "important guideposts," "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances." *Palazzolo*, 533 U.S. at 634, 636 (O'Connor, J., concurring); *see also Tahoe-Sierra*, 535 U.S. at 321 (whether a taking has occurred "depends upon the particular circumstances of the case"); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 523 (1992) (Regulatory takings claims "entail[] complex factual assessments.").

ANALYSIS

A. *The Relevant-Parcel Determination*

1. *Factors to consider.*

As a threshold matter, the court must determine how to define the relevant parcel in this case. This question of the relevant parcel "is referred to as the denominator problem, because, in comparing the value that has been taken from the property by the imposition with the value that remains in the 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.'"

Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000). On this question, there is no bright-line rule; rather, the court takes "a flexible approach, designed to account for factual nuances." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *see also Palm Beach Isles*, 208 F.3d at 1381.

In *Penn Central*, the Court indicated that the focus on the takings analysis must be the effect of the regulation on the "parcel as a whole":

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

438 U.S. at 130-31; *see also Tahoe-Sierra*, 535 U.S. at 327 ("*Penn Central* . . . ma[d]e it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as a whole.'"). Accordingly, a takings claimant may not "conceptually sever" the regulated portion of a parcel by simply "defining the property interest taken in terms of the very regulation being challenged." *Tahoe-Sierra*, 535 U.S. at 331. In this regard, the Supreme Court has explained, "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken *is*

all, or *only a portion of*, the parcel in question." *Concrete Pipe & Prod. Of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993) (emphasis added).

The relevant-parcel analysis focuses on, among other things, "the owner's actual and projected use of the property." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *see also Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005); *Loveladies Harbor*, 28 F.3d at 1181; *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986). Relevant takings precedent has yielded a number of factors that bear on the inquiry, including: (1) the degree of contiguity between property interests, (2) the dates of acquisition of property interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands. *See Palm Beach Isles*, 208 F.3d at 1381. The court previously also stated that a sixth factor, "(6) the extent [to which] any earlier development had reached completion and closure" was also a relevant consideration in the relevant-parcel analysis. *Lost Tree*, 92 Fed. Cl. at 718. Inclusion of that factor has engendered considerable debate between the parties in this case. Although the government concedes that temporality may be considered in relation to the imposition of the regulatory scheme, it claims that temporal considerations related to progression of development may not in-

form the court's analysis, and that severing a parcel on temporal grounds runs afoul of the Supreme Court's opinion in *Tahoe-Sierra*. *See* Cl. Tr. 36:25 to 37:10; Def.'s Post-Tr. Br. at 9 ("[T]he Supreme Court's opinion in *Tahoe-Sierra* . . . precludes temporal severance of the parcel as a whole."). Conversely, Lost Tree claims that "the Federal Circuit has twice directly held that property sold by the landowner prior to the regulatory imposition should be excluded from consideration in comparing the property value lost from that which the landowner retained." Pl.'s Post-Tr. Br. at 5 (citing *Loveladies Harbor*, 28 F.3d at 1181; *Palm Beach Isles*, 208 F.3d at 1380-81). Lost Tree contends that temporal considerations "require exclusion from the relevant parcel in this case of all property that Lost Tree sold before attempting to develop Plat 57." Pl.'s Post-Tr. Br. at 5. Neither Lost Tree nor the government accurately capture the import of the cases upon which they rely.

In *Loveladies Harbor*, Loveladies had originally acquired a 250-acre tract of land, and by 1972, it had developed 199 acres of that land and sold all but 6.4 of those 199 acres. 28 F.3d at 1174, 1180. To develop the remaining 51 acres, Loveladies needed to fill 50 acres, one acre having been previously filled. *Id.* at 1174. Negotiations with the State of New Jersey yielded a compromise that allowed Loveladies to develop 12.5 acres, including the one acre previously filled, and required Loveladies to donate to the state the remaining 38.5 acres. *Id.* at 1174, 1180. The Corps rejected the fill permit for the 12.5 acre development. *Id.* at 1174.

In determining that the relevant parcel was the 12.5 acres, the Federal Circuit first excluded the 199 acres previously developed. 28 F.3d at 1181. In doing so, it considered "the timing of transfers in light of the developing regulatory environment," noting that the regulatory scheme was not imposed upon Loveladies until after the 199 acres had been developed and sold in substantial part. *Id.* The court additionally noted that the development of the 199 acres "occurred over a substantial period of years beginning in 1958, and involved many kinds of government permits." *Id.* The court also eliminated from the relevant parcel those 38.5 acres which had been promised to New Jersey "since whatever substantial value that land had now belongs to the state and not to Loveladies" and opining that it was inappropriate to count against Loveladies property donated to the state for the purposes of the takings analysis. *Id.* at 1181.[26]

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[26] In affirming the trial court's opinion, the Federal Circuit characterized the lower court decision as "conclud[ing] that land developed or sold before the regulatory environment existed should be included in the denominator." *Loveladies*, 28 F.3d at 1181. Notably, however, the trial court in *Loveladies* excluded the previously-sold 192.6 acres because "on the basis of *Keystone* [*Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)], th[e] court cannot include the value of all of the property originally purchased as the parcel as a whole[; rather], th[e] court must limit its focus upon the value of that property which plaintiffs held when the taking was said to have occurred." *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 392 (1988); *see also Loveladies Harbor*, 28 F.3d at 1180 n.13 (noting that *Keystone* described the regulatory takings analysis as requiring courts "to compare the value that has been taken from the property with the value that

In *Palm Beach Isles*, a group of investors bought 311.7 acres of land in 1956. 208 F.3d at 1377. By 1968, all but 50.7 acres of the original 311.7 had been sold to another developer. *Id.* Palm Beach was denied a permit to fill the remaining 50.7 acres. *Id.* at 1378. In concluding that the relevant parcel was the 50.7 acres, the Federal Circuit noted that the 261 acres were sold prior to enactment of the Clean Water Act, which created the substantive regulatory regime under which the permit was denied. *Id.* at 1381. The court considered also the circumstance that "[t]he development of [the 261 acres] was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands," and stated that "[c]ombining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time

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remains in the property") (emphasis added). The court excluded the 6.4 acres because those acres "had become sporadically held units of property, all of which were no longer contiguous with the 12.5 acres at issue." 15 Cl. Ct. at 392.

Keystone Bituminous indeed frames the takings analysis in a way that would appear to exclude previously-sold property. 480 U.S. at 497 ("compare the value that has been taken from the property with the value that *remains in the property*") (emphasis added); *see also Palm Beach Isles*, 208 F.3d at 1380 n.4 (describing the takings analysis as "comparing the value that has been taken from the property by the imposition with the value that remains in the property"). This formulation, however, has not been taken literally in some subsequent cases, where previously-sold property has been included in the takings denominator. *See, e.g.*, *Norman*, 429 F.3d at 1087, 1091 (finding that the relevant parcel was a 2280-acre tract purchased by appellants where appellants owned only 716 acres of the 2280-acre tract when the permit was denied).

they were under common ownership . . . cannot be justified." *Id.*

Tahoe-Sierra addressed temporality in a related, but analytically distinguishable, context. In *Tahoe-Sierra*, the petitioners claimed that a temporary 32-month moratorium on development of their property constituted a *Lucas*-style categorical taking because claimants were deprived of all economic use of their property for those 32 months. 535 U.S. at 331. In rejecting petitioners' contention that the 32-month segment should be conceptually severed from the remainder of the owners' fee simple estate, the Court noted that "[a]n interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest." *Id.* at 331-32. In this regard, the Court stated, "[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* at 332. Once petitioners' property interests were defined as their respective fee simple estates, the Court concluded that there was no taking because "a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not." *Id.* The Court did not adopt a *per se* rule against takings claims based on temporary moratoria, however. To the contrary, it stated explicitly, "[i]n our view[,] the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the

case." 535 U.S. at 321; *id.* at 337 ("In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.").[27]

Thus, while *Palm Beach Isles* and *Loveladies Harbor* considered whether previously-owned property by the claimant was disposed of prior to implementation of the pertinent regulatory scheme, both cases looked also to the nature of development and prior dispositions of property to determine the relationship between the properties that had been sold, donated, or otherwise transferred and the regulated parcel. *See Palm Beach Isles*, 208 F.3d at 1381; *Loveladies Harbor*, 28 F.3d at 1181; *see also Walcek v. United States*, 49 Fed. Cl. 248, 260 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (summarizing *Palm Beach* and stating that in *Palm Beach*, the Federal Circuit "heavily relied on the fact that all but 50.7 acres had been sold by the plaintiff in 1968, long before the development in question was proposed"). Neither *Palm Beach Isles* nor *Loveladies Harbor*, however, articulated a categorical rule that the court must exclude previously-sold property

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[27] In *Tahoe-Sierra*, the majority of the Supreme Court rejected a suggestion by Chief Justice Rehnquist "that delays of six years or more should be treated as *per se* takings," 535 U.S. at 338 n.34, opining that the "temptation to adopt what amount to *per se* rules in either direction must be resisted." *Id.* at 342 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)). The majority observed, however, that "[i]t may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism." *Id.* at 341.

from the parcel as a whole. In short, facts regarding the progression and status of development plus sale of potentially-related properties are aspects of property ownership that reflect manifestations of a property owner's use and projected use of property. If the particular circumstances and realities of usage indicate that temporal considerations are salient, then temporality has to be taken into account in determining the "parcel as a whole."[28]

2. *Application of factors.*

Lost Tree contends that "Plat 57 should be considered alone as the relevant parcel" for the takings analysis. Pl.'s Post-Tr. Br. at 3. This is so, Lost Tree avers, because it did not have any overall development plan for the property purchased under the 1968 Option Agreement or for the community of John's Island, *id.* at 7, and as of 1995, Lost Tree had sold virtually all developable property in the community of John's Island, *id.* at 9. In this vein, Lost Tree argues that Plat 57 is commercially unconnected to and divorced from any property that Lost Tree has owned or owns now. *Id.* at 10.

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[28] Quite simply, there are very few *per se* rules in regulatory takings cases. *See Tahoe-Sierra*, 535 U.S. at 322 ("Our jurisprudence involving condemnations and physical takings . . . for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, . . . is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'") (citations omitted); *Palazzolo*, 533 U.S. at 636 ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.") (O'Connor, J., concurring).

The government argues that the entire community of John's Island is the relevant denominator in this case. Def.'s Post-Tr. Br. at 5. In this connection, the government points to the circumstances that Plat 57 was acquired with the rest of the community of John's Island under the Option Agreement, *id.* at 12, and that Plat 57 is within the physical boundaries of the community, *id.* at 11. The government maintains that Lost Tree has treated Plat 57 as part of the single economic unit of the community of John's Island, *id.* at 14, and that Lost Tree's plans for the community included Plat 57, *id.* at 19. Alternatively, the government avers that, at a minimum, the parcel as a whole includes either (1) the Island of John's Island and Gem Island, *id.* at 29, or (2) all property within the community of John's Island at the time of Lost Tree's "[c]orporate [r]eorganization" in 1995, *id.* at 30, or (3) all property within the community of John's Island owned by Lost Tree at the time of the Plat 57 permit application, *id.* at 31.

Plat 57 indeed lies within the physical boundaries of the community of John's Island. Stip. ¶ 133. And it was purchased under the 1968 Option Agreement, along with the approximately 1,300 acres that ultimately became part of—but not the entirety of—the community of John's Island. *Id.* ¶ 14. The government contends that these facts are sufficient to establish the parcel as a whole as the entire community of John's Island. *See* Def.'s Post-Tr. Br. at 12, 14. The contiguous nature of Plat 57 to other developed properties within the community of John's Island, and the bulk purchase of the properties constituting a substantial part of the community of John's

Island are important considerations. *See Ciampitti v. United States*, 22 Cl. Ct. 310, 330 (1991) (relevant parcel included more than regulated property where claimant treated regulated property plus other lands as "a single parcel for purposes of purchase and financing"). Nevertheless, these factors are just several among many, and neither factor is necessarily dispositive. *See Palm Beach Isles*, 208 F.3d at 1377 (relevant parcel was 50.7 acre property despite being purchased along with 261 acres in one transaction); *Cane Tenn., Inc. v. United States*, 60 Fed. Cl. 694, 703 (2004) ("[C]ontiguity is just one factor in the parcel-as-a whole analysis."); *Ciampitti*, 22 Cl. Ct. at 320 (relevant parcel included noncontiguous property).

The government further contends that "Lost Tree proceeded with a development scheme aimed at developing the [c]ommunity of John's Island as a single integrated community." Def.'s Post-Tr. Br. at 14-15. The evidence adduced at trial, however, does not support the government's position. As noted, although the 1968 Option Agreement called for a development plan, no plan such as the one envisioned by the Agreement nor any plan for developing the whole community has ever been found. Stip. ¶ 17. In light of Lost Tree's significant and ultimately unsuccessful efforts in the 1990s towards finding a development plan, the court is persuaded that no such plan has ever existed.

The government would supplant the lack of an overall master plan for the community of John's Island by reliance on the 1980 Development Plan. Def.'s Post-Tr. Br. at 20-24. However, the government's contention that the 1980 Development Plan serves as a master scheme of

development tying Plat 57 to the entire community of John's Island overlooks crucial facts. The 1980 Plan explicitly covered only the Island of John's Island and Gem Island—not the entire community of John's Island. *See* PX 33 (1980 Development Plan). Thus, to the extent the 1980 Development Plan ties Plat 57 to other properties it cannot bind it to the entire community of John's Island. Furthermore, the community of John's Island encompasses parcels which were neither covered by the 1968 Option Agreement nor ever owned by Lost Tree. Stip. ¶¶ 19-20.

What is more, the 1980 Permit Application was not approved and was superseded by a revised, scaled-back development proposal that led to the ultimate grant of the 1982 Permit. The area that much later became Plat 57 was simply not addressed by the revised proposal that was granted. In this connection, a technical staff report created by Mr. Mark Gronceski, senior scientist for the St. John's River Water Management District, recounted the permitting history of John's Island and stated:

> It is clear from the DER file that many of the 'wildlife preserve' areas so labeled on early drawings were originally proposed to be formally preserved via an easement as mitigation for the totality of impacts initially proposed, but were dropped when the proposed impacts were greatly reduced by deletion of the three canals and the 'tidal ponds' from the DER application and permit.

PX 85 at LTVC003008 (Facsimile entitled "Lost Tree Village Permitting History" from Mr. Gronceski to Mr.

Melchiori (July 13, 1998)). Ms. Sadowski concurred, stating that because Plat 57 was not shown as a wildlife preserve on the permit ultimately granted to Lost Tree, Plat 57 was no longer proposed as mitigation for that permit. Tr. 934:11-24 (Sadowski). Mr. Melchiori testified to the same effect, stating that once the revised proposal replaced the 1980 Permit Application, the Plat 54 and Plat 57 properties "no longer had th[e] designation [of wildlife preserves for mitigation]." Tr. 408:2-7 (Melchiori).

The government responds that many proposed features of the 1980 Permit Application are present in the community of John's Island today, including the causeway from the Island of John's Island to the Barrier Island, certain roads, and the preservation of certain areas as wildlife preserves. *See* Def.'s Post-Tr. Br. at 23. Nonetheless, development on Gem Island and the Island of John's Island proceeded piecemeal in a manner that diverged in significant ways from the 1980 Application. *See* Stip. ¶ 69; Tr. 398:1-7 (Melchiori). Some proposed roads and canals in the 1980 Development Plan were built at different locations, some canals were never built at all, and some lots were configured differently than those proposed in the 1980 Application, the 1982 Permit, and a permit issued in 1983. *See* Stip. ¶ 69; Tr. 398:8 to 402:9 (Melchiori) (reciting examples of deviations from the 1980 Development Plan).

Evidence is also lacking that any informal development plan of which Plat 57 was a part has ever existed. The development of the property purchased by Lost Tree pursuant to the 1968 Option Agreement is best charac-

terized as being one of opportunistic progression. *See* Tr. 90:2-5 (Bayer) ("[T]he property was developed sort of plat[] by plat[] by plat, and each development where [Lost Tree] built a road, filled lots, graded them, and built houses, was done on a step-by-step basis."); Tr. 785:12-16 (Stone) (testifying as to Lost Tree's fluid development intentions for John's Island). It occurred over approximately thirteen years, or, under the government's view, a longer period of time, and involved multiple distinct plat recordings and government permits. *Cf. Loveladies*, 28 F.3d at 1181 (noting that development of 199 acres originally purchased with regulated property but excluded from the relevant parcel "occurred over a substantial period of years beginning in 1958, and involved many kinds of government permits").

Reference to cases in which development plans tied the regulated property to a larger parcel is instructive. For example, in *Norman*, the Federal Circuit concluded that the parcel as a whole included the entire 2280-acre parcel originally purchased by appellants, not a 470-acre portion, where "appellants' own permit application related to the entire 2280-acre parcel, and not any subdivision thereof." 429 F.3d at 1091 n.4. In that case, however, the challenged permit came about as "a result of a negotiations process between the Corps and plaintiffs, in which the parties discussed which areas of property on the 2280-acre Development could be utilized as mitigation wetlands." *Id.* at 1086 (internal quotation marks omitted).[29]

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[29] In *Norman*, appellants argued that because they bought a parcel of land in 1988 in reliance upon a favorable delineation demar-

In *Forest Properties*, appellants applied for a Section 404 permit for the fill of 9.4 acres. 177 F.3d at 1363. The permit application proposed the creation of "a residential subdivision that [would] contain waterfront lots and a small marina," and stated "[a] total of 62 acres (9 acres of filled area) will be developed with approximately 100 lots." *Id.* After the Corps indicated it would not approve the permit, the application was revised to require fill of only 4.4 acres of land, but the permit was still denied. *Id.* As in *Norman*, the Federal Circuit concluded that the relevant parcel for the takings analysis was the entire 62 acres, not, as appellants urged, the 9.4 acres proposed to be filled in the original application, because the permit applications explicitly demonstrated that the 62 acres were considered "a single integrated project." *Id.* at 1365.

Similarly, in *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), plaintiff purchased a 10,000 acre parcel and created a "master plan [which] called for more than 12,000 single family tracts, numerous multifamily sites, school and park areas, shopping districts, marinas, beaches[,] and regular utilities," with the community to be called Marco Island. 657 F.2d at 1188. The plaintiff also divided Marco Island into five permit areas to be

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cating jurisdictional wetlands by the Corps, a subsequent and less favorable re-delineation in 1991 culminated in a taking of the portion of appellants' property that they were required to dedicate in order to receive a development permit in 1999. 429 F.3d at 1088. Although appellants expressly disavowed a challenge to the 1999 permit itself, the court addressed the possibility that the 1999 permit effected a taking. *Id.*

built consecutively, with each stage projected to take three to four years to complete. *Id.* Although the parcel-as-a- whole issue did not receive significant attention, the Court of Claims defined the relevant parcel as the entire 10,000 acre parcel. *Id.* at 1193.

Far from the development plan evidenced by the *Norman* plaintiffs in their 2280-acre permit application and their ensuing negotiations with the Corps, and from the explicit master plans at issue in *Forest Properties* and *Deltona*, there exists in this case no master plan of development for the community of John's Island. Furthermore, subsequent to the superseding revision of the 1980 Permit Application, Plat 57 was never tied explicitly or implicitly to any subsequent permit nor was the community of John's Island tied to the Plat 57 permit application.

Evidence regarding Lost Tree's intended usage of Plat 57, or lack of any projected usage, subsequent to the issuance of the 1982 Permit is equally telling. In 1985, development of Stingaree Point went forward, with utilities being "stubbed out" to all then-platted lots and to the then-unplatted area of Plat 55. Lost Tree's failure to "stub out" utilities to the property constituting Plat 57 at that time demonstrates the lack of any plan to include Plat 57 in the progressive development of the Island of John's Island. *See also* PX 56 at LTVC013533 (1986 Appraisal) (noting that "Stingaree Point development is substantially completed," with few exceptions of which Plat 57 was not a part). It is apparent that after 1982 and until at least 1994, Plat 57 was ignored entirely as development of the community of John's Island came to a close.

As of 1994, when most knowledgeable people considered development of the community of John's Island to have been completed, the property constituting Plat 57 had not been platted, utilities had not been extended to it, nor had it been dedicated to any use such as mitigation for a project on other plats.

When Mr. Melchiori included the Plat 57 property on the 1995 List taking inventory of Lost Tree's residual properties, Lost Tree became aware of its ownership of that land. At that time, however, Lost Tree did nothing with the property. Instead, Lost Tree left Plat 57 untouched for the next seven years, until The Estuary notified Lost Tree in 2002 of its intentions to develop a part of McCuller's Point. Even at that time, Lost Tree did not immediately consider Plat 57 for development. Rather, as Mr. Bayer and Mr. Melchiori testified, Lost Tree surveyed the remaining residual properties it owned, and settled on Plat 57, due in large part to the fact that Plat 57 had been subject to trenched and mounded mosquito control impoundments and was immediately adjacent to a road.

Lost Tree's treatment of Plat 57 and the adventitious nature of Plat 57's development is inconsistent with the contention that an overall development of which Plat 57 was a part existed for the community of John's Island. It also reveals 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 community of John's Island, *Forest Properties*, 177 F.3d at 1365, nor did Lost Tree's development of the community, which had concluded no later than seven years prior to the recording of

Plat 57, dictate the decision to develop Plat 57. As in *Palm Beach Isles*, here, the development of the community of John's Island was "physically and temporally remote from" Plat 57. 208 F.3d at 1381.

In short, the evidence does not support the finding that Lost Tree treated Plat 57 together with the entire community of John's Island as "a single income-producing unit," nor does it support the conclusion that any overarching development scheme applied to Plat 57. Focusing on Lost Tree's actual use of the property, the court finds that the parcel as a whole cannot be defined as the entire community of John's Island. Having concluded this much, the court must now determine if the parcel as a whole nonetheless includes other property besides Plat 57.

The evidence adduced at trial makes plain that in 1994 Lost Tree changed the direction of its operations to focus on investment in commercial properties. Attendant to that changed business purpose it endeavored to dispose of all of its residual real estate holdings, inside and outside the community of John's Island. Lost Tree accordingly sold Plat 52 in 1995 and put the North Acreage and the West Acreage on the market that same year. In 1997, Lost Tree sold Plat 54 to Horse's Head Ltd., along with Hole-in-the-Wall Island and other residual properties that might be placed in conservation easements to support development of Plat 54. In 1999, Lost Tree submitted an application to the Town of Indian River Shores for a plat on a portion of the Lost Tree Islands, separated from and some distance to the south of the John's Island community. The denial of that application ultimately led to the

2003 disposition of those Islands. In 1999, the North Acreage property was sold. Thus, as of the 2002 submission of the permit application for Plat 57, Lost Tree held only the West Acreage, lying well outside of the community of John's Island, and Plat 55, Plat 57, and scattered unusable wetland parcels within the community. The government does not contest the exclusion of the West Acreage from any parcel-as-a-whole determination for Plat 57. *See* Def.'s Post-Tr. Br. at 5, 29-31 (proffering four potential relevant-parcel configurations, all of which exclude the West Acreage as well as the North Acreage, which was sold in 1999). The West and North acreages are well removed from the John's Island community and never were associated with the community. The parties consequently have focused on Plat 55 and the relatively small and scattered residual wetlands.

Lost Tree avers that Plat 55 should be excluded from consideration because it is a distinct parcel, separated by a 323-foot strip of land from Plat 57, and because Plat 55 was developed years before Plat 57 was projected. Pl.'s Post-Tr. Reply Br. at 9. Lost Tree contends also that the two properties are distinct because Lost Tree has different usage objectives for each, with Plat 55 being held for "asset planning" or "investment," instead of sale. *Id.*

Plat 55 and 57 are indeed two separate parcels, recorded at different times, with a 323-foot strip of land lying between them. However, Lost Tree owned at the time of the permit application, and owns at the present time, that 323-foot strip of land. *See* Pl.'s Post-Tr. Br. at 9 ("[A]fter those sales [of Plat 52 and Plat 54], the only property Lost Tree owned inside the John's Island community, apart

from a few very small, *de minimis* pieces, was . . . Plat 57, Plat 55 and a handful of scattered and unusable wetland and/or mangrove covered parcels, including the very narrow foot strip of land between plat 57 and 55."); Tr. 1413:6-12 (Melchiori) (affirming that the 323-foot strip of land is owned by Lost Tree today). Thus, while the plats are distinct legal parcels, they are undoubtedly contiguous.

Moreover, the court finds unpersuasive Lost Tree's contention that the two properties are currently held for distinct usage objectives. Mr. Armfield stated that he conducted an appraisal of potential remainder estates in Plat 55 in October 2001 because the Stone family was "making decisions about asset planning." Tr. 648:13-14. Nevertheless, Mr. Bayer testified in unequivocal terms that Plat 55 was retained by Lost Tree due to its potential for increasing property values and the absence of a financially satisfactory offer for the property. Tr. 135:3 to 136:11. He stated also that the Plat had been listed for sale some years after its recording, Tr. 136:2-3, thus belying the contention that Lost Tree does not intend to sell Plat 55. The usage objectives of Plat 55 and Plat 57 thus are comparable: Lost Tree hopes to sell for profit the lots on Plat 55 just as it did the projected lot on Plat 57.

On this issue, the court finds guidance as well from the seminal case of *Penn Central*. The facts of that case are familiar but deserve a brief recitation. In *Penn Central*, the petitioner owned several properties in an area of midtown Manhattan, including Grand Central Terminal. 438 U.S. at 115. The State of New York designated the

Terminal a "landmark," and the "city tax block" it occupies a "landmark site." *Id.* at 115-16. That designation ultimately prevented petitioner from receiving New York City's approval to develop an office building on the Terminal. *Id.* at 117-18. Petitioners were permitted, however, under the New York zoning laws, to transfer development rights to other parcels meeting certain geographic qualifications (such as location on the same city block, across the street, or nearby), and to transfer all unused development rights to any one of those parcels. *Id.* at 113-15. The Supreme Court denied petitioners' taking claim. 438 U.S. at 138. The Court found that the relevant parcel included not just petitioners' property interest in the air rights above the Terminal; rather, it consisted of the "city tax block" designated as the landmark site. *Id.* at 131. And, in considering whether petitioners had been denied all economically viable use of their property rights, the court found persuasive the fact that petitioner's air rights were "made transferable to at least eight parcels in the vicinity of the Terminal." *Id.* at 137.

This particular aspect of the Court's analysis in *Penn Central* has since been the subject of considerable discussion in later Supreme Court cases. For example, in *Lucas*, the Court opined on the denominator problem, noting that the precedents surrounding the parcel-as-a-whole rule were murky at best. 505 U.S. at 1016 n.7. In this regard, the Court mentioned as an example the state court's definition of the parcel as a whole in *Penn Central* as "the takings claimant's other holdings in the vicinity," criticizing that formulation as "an extreme . . . and . . . unsupportable . . . view." *Id.*; *see also Palazzolo*, 533

U.S. at 631 (noting that the Court in *Lucas* had expressed discomfort with some applications of the parcel-as-a-whole rule). These observations about *Penn Central* echo the tension in the *Penn Central* decision itself between the definition of the relevant parcel as being the "city tax block" and the subsequent statement that the transferability of Penn Central's air rights to "at least eight parcels in the vicinity of the Terminal . . . [is] to be taken into account in considering the impact of regulation." 438 U.S. at 137.

Some clarification to the Court's approach to the relevant parcel in *Penn Central* was made in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 749 (1997), by Justice Scalia in a concurring opinion. In distinguishing *Penn Central* from the case then before the Court, Justice Scalia stated that the transferable development rights were considered in *Penn Central* because the petitioners were "landowners who owned at least eight nearby parcels, some immediately adjacent to the terminal, that could be benefitted by the [transferable development rights]." *Id.* Thus, "[t]he relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished." *Id.*

Penn Central's treatment of the parcel-as-a-whole issue and its consideration of properties owned by Penn Central in the vicinity of the Terminal favor inclusion of Plat 55 and the remaining scattered wetlands in the relevant parcel. Accordingly, the court finds that the parcel as a whole in this case is Plat 55 and Plat 57, plus those

scattered wetlands still owned by Lost Tree within the community of John's Island.

B. *Application of* Penn Central *Factors*

1. *Economic impact of the regulation on the claimant's property.*

a. *Aggregation of entities.*

The government suggests that in calculating the economic impact of the denial of the Plat 57 permit application, the court should aggregate Lost Tree's profits realized from its ventures developing the property purchased under the 1968 Option Agreement and those profits realized by what the government labels Lost Tree's eight "affiliated companies." Def.'s Post-Tr. Br. at 43.[30] It contends that "no other method could adequately convey the true value of the John's Island enterprise." *Id.* at 43 n.10. To that end, the government presented at trial the testimony of Mr. Barry, a forensic accountant, who determined that the sale value of Plat 57 as permitted would constitute 3.6% of profits from the community of John's Island, when such profits are defined as encompassing those realized by companies such as Horse's Head Ltd., Gem Island Investment, and Lost Tree Preserve. Tr. 1305:20-23, 1342:10 to 1343:12 (Barry); *see* DX 139 (Mr. Barry's Expert Report).

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[30] Those eights companies are: Lost Tree Village Corporation, John's Island Real Estate Company, John's Island Inc., Lost Tree Real Estate Company, Gem Island Investment L.P., Island House Land Lease, Golf Club Investment L.P., and Horse's Head Ltd. DX 139 at EXP000003. Several of those companies had no relationship to the John's Island community.

Mr. Barry testified that he aggregated the companies based on an explicit instruction he received from the government to do so. Tr. 1300:5. He opined that the instruction was supported in his mind by his familiarity "with the fact of how real estate development companies tend to set up affiliated entities to do various aspects of the development and marketing," Tr. 1278:7-10, and "the logic of the fact that these other entities were carrying out some of the development and selling activity on behalf of the option land," Tr. 1300:6-8.[31] Mr. Barry contended that the decision to aggregate was based also on the common control of each of these entities based on ownership by a member of the Ecclestone or Stone family. Tr. 1288:5-11. At trial, although Lost Tree objected to Mr. Barry's testimony, the court accepted Mr. Barry as an expert in forensic accounting but did not accept Mr. Barry as an expert on aggregation or consolidation of businesses. *See* Tr. 1304:1-6.

In *Cane*, the court faced a similar contention by the government that property held by legally distinct entities should be aggregated for purposes of the relevant-parcel and economic-impact analyses. In that case, three individual plaintiffs and three trusts for the benefit of those plaintiffs brought jointly a takings claim for property interests that they had received in a series of donative

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[31] Mr. Barry first stated that it was his understanding that all eight companies participated in developing or marketing the land acquired from the option agreement. Tr. 1277:11-15. He later revised his answer stating that perhaps Lost Tree Real Estate Company did not, but "it's a minor . . . part of the aggregate numbers." 1277:15-18.

transfers from the parents of the individual plaintiffs. 60 Fed. Cl. at 696, 700. The government argued that aggregation of the various interests owned by all of the plaintiffs, both individuals and trusts, was proper and that the relevant parcel for the takings analysis was the entirety of the property interests that were acquired from the individual plaintiffs' parents in the county in which the alleged taking occurred. *Id.* at 700. The court disagreed, finding that the various property interests had not been treated as a single economic unit by the plaintiffs. *Id.* at 700 (citing *Forest Props.*, 177 F.3d at 1365). The court relied also on the fact that the interests were acquired by the individuals and the trusts decades apart, that they were separate legal entities, and that legal title to property interests held in trust resided in the trustee, not the beneficiaries. *Id.* at 700-01.

As in *Cane*, the properties which the government seeks to aggregate in this case are distinct legal entities, with substantially differing ownership interests. The companies were created at different times throughout four decades, and acquired their ownership interests in portions of the community of John's Island in varying degrees at separate periods. What is more, the ownership interests in many of the companies are principally held by Mrs. Stone's two daughters, not Mrs. Stone.

Upon even cursory consideration, the artificiality of such aggregation is apparent. To capture accurately the total profits yielded by the development of the community of John's Island, one would have to look to land owned by other entities unassociated with the Stone or Ecclestone family. *See* Tr. 1301:25 to 1302:3, 1303:13-18 (Barry);

Stip. ¶¶ 19-20 (The community of John's Island encompasses parcels not covered by the 1968 Option Agreement nor ever owned by Lost Tree Village Corporation.). Mr. Barry admitted this much, stating "[i]f you're trying to get at the entirety of the profit in respect to developing John's Island, you would include even entities that aren't under the same control I suppose, but for our purposes we tried to limit the companies . . . to just ones that seem to be under the common control of the Ecclestone/Stone family." Tr. 1301:25 to 1302:7. Mr. Barry's decision to circumscribe the analysis to only those companies which were "under the common control of the Ecclestone/Stone family," finds its basis not in the facts of this case but rather only in a direction from the government.

The Federal Circuit has held that if a "developer treats legally separate parcels as a single economic unit, [then] together they may constitute the relevant parcel." *Forest Props.*, 177 F.3d at 1365. This is hardly the same, however, as aggregating separate parcels owned by legally separate entities (none of whom are plaintiffs to this suit) to determine the economic impact of an alleged taking under the third factor of *Penn Central*. Unsurprisingly, the government has cited no precedent holding that profits realized by separate legal entities should be aggregated with those realized by the actual takings claimant to determine the economic impact of a taking. In short, the court rejects any aggregation of Lost Tree with other companies in which Mrs. Stone or her daughters have or have had an ownership interest.

b. *The impact of the Plat 57 permit denial on Lost Tree.*

Lost Tree did not provide at trial any evidence recounting the economic impact of the permit denial for Plat 57 when the relevant parcel is defined as including more than Plat 57 itself. *See* DX 134 (Mr. Armfield's Expert Report) (appraising only Plat 57). Lost Tree bears the burden of establishing a regulatory taking, and in the absence of any evidence regarding economic impact, it manifestly would fail to meet that burden. *Forest Props.*, 177 F.3d at 1367. However, the government submitted an appraisal by Mr. Underwood of the residual properties owned by Lost Tree Village at the time of the permit application for Plat 57 on the Island of John's Island and Gem Island. *See* DX 137 ("An Appraisal of Residual Properties Owned by Lost Tree Village at the Time of Permit Application for Plat 57 on the Island of John's Island and Gem Island"). Mr. Underwood's appraisal accordingly will be applied in determining economic impact.

Mr. Underwood included in his appraisal the value of the lots on Plat 54, which had been sold to Horse's Head Ltd. prior to the time of the Plat 57 application. *See* DX 137 at EXP000169.[32] Because Mr. Underwood provided

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[32] At the time of the Plat 57 Permit Application, Horse's Head Ltd. owned one of the Plat 54 lots, Gem Island Investment L.P. owned a second, and the third was owned by a company called BW Palm Road, Inc. DX 137 at EXP000154-55. In his appraisal, Mr. Underwood stated that "[t]he larger parcel is based on a legal instruction. Two of the lots in Plat 54 are owned by related com-

a disaggregated valuation for each individual parcel, the court may nonetheless use Mr. Underwood's appraisal to determine the economic impact of the denial of the Plat 57 permit on the property the court has identified as the parcel as a whole. After subtracting the property values representing Plat 54 from Mr. Underwood's calculations, the court finds that the imposition of the regulations here diminished the value of Lost Tree's property by approximately 58.4%.[33] This degree of diminution plainly does not constitute the type of total economic wipeout that constitutes a categorical taking under *Lucas*.

A partial taking may be compensable under *Penn Central*, but not all diminutions in value constitute partial regulatory takings. *See generally Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994) (discussing diminutions in value versus partial regulatory takings). The line dividing the two is unfixed, and on balance, similar reductions in property value might lead to disparate outcomes. *See Lucas*, 505 U.S. at 1019 n.8.

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panies; the third lot is owned by an individual [sic]." *Id.* at EXP000169.

[33] The total value of Plat 54 is listed as $10,230,000 in Mr. Underwood's report. *See* DX 137 at EXP000206. When that value is subtracted from the total value of Lost Tree's residual parcels, the value drops to $2,755,000. *See id.* at EXP000208. Eliminating also the appropriate taxes, commissions, and expenses associated with Plat 54, as well as unjustified entrepreneurial incentives, the total retrospective market value of the relevant parcel "as is" as of August 9, 2004 was $2,388,990. The total value of the parcel had the permit been granted on August 9, 2004 was $5,749,590. This represents a diminution in value of 58.4%.

This case, however, does not require splitting hairs. A diminution in value of 58.4%, while not insignificant, ordinarily falls short of a compensable taking under Supreme Court and Federal Circuit precedent. *See, e.g.*, *Concrete Pipe*, 508 U.S. at 645 (46% diminution not a taking); *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (approximately 50% diminution not a taking); *Ciampitti*, 22 Cl. Ct. at 320 n.5 (25% diminution not a taking); *see also Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 385 (2004) ("[I]t stretches the concept of partial taking too far to say that a diminution on the order of 50 percent or less has the effect of a taking.").

2. *Reasonable investment-backed expectations.*

Under *Penn Central*, the court considers as well the extent to which the regulatory restriction interfered with Lost Tree's reasonable investment-backed expectations. 438 U.S. at 124; *see also Forest Props.*, 177 F.3d at 1367. Although "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations," *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring), takings claims are "not barred by the mere fact that . . . title was acquired after the effective date of the state-imposed restriction," *id.* at 630 (majority op.). *See also Palm Beach Isles*, 231 F.3d at 1364 ("The existence of a regulatory regime does not per se preclude all investment-backed expectations for development.").

The government avers that under Lost Tree's own recitation of the facts, it had "no intention or expectation

that Plat 57 would be developed as a residential homesite," and as of 2001 or 2002, those expectations "could not have been reasonable, [because] the regulatory scheme at that time was well-settled." Def.'s Post-Tr. Br. at 39 (emphasis omitted). Lost Tree responds that it had "inchoate expectations for all the property it purchased and paid for under the 1968 Option Agreement," but did not develop "distinct economic expectations for Plat 57" until 2001. Pl.'s Post-Tr. Reply Br. at 13-14 (emphasis omitted).

Lost Tree arguably possessed expectations for Plat 57 beginning in 2001 or 2002; however, those expectations were subject to the regulatory regime then in place. Lost Tree's expectations were not objectively unreasonable given the adventitious projected development at McCuller's Point by The Estuary, coupled with the facts that Lost Tree had property on the Point that was readily available for wetland improvement, *i.e.*, removal of a previously installed mosquito control project, and the State supported the project.

3. *Character of the government action.*

Third, and finally, the court looks to the character of the government action, *Penn Central*, 438 U.S. at 124, examining "the purpose of the regulation and its desired effects," *Bass Enters.*, 381 F.3d at 1370. *See also Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003) ("The character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition."). In *Eastern Enterprises v. Apfel*, 524 U.S. 498,

537 (1998), the Supreme Court suggested that in considering the character of the government action, the court look also to the extent to which the action is retroactive and whether the action targets a particular individual.[34]

The government action at issue in this case occurred under the Clean Water Act, the goal of which is to "restore and maintain the chemical, physical and biological integrity of the [n]ation's waters." 33 U.S.C. § 1251(a). The Federal Circuit and this court have confirmed that the Clean Water Act and its stated goal of preserving the nation's waterways and wetlands is a legitimate governmental objective tied to the public welfare. *See Florida Rock Indus.*, 791 F.2d at 904 ("[T]he preservation of wetlands bears a substantial relationship to the public welfare."); *Brace v. United States*, 48 Fed. Cl. 272, 279 (2000) ("[T]he United States has a legitimate public welfare obligation to preserve our nation's wetlands.").

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[34] In *Palazzolo*, the Supreme Court mentioned that the legitimacy of the public interest might be a consideration. *See* 533 U.S. at 633-34 ("[A] use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose.") (internal quotations omitted) (quoting *Penn Central*, 438 U.S. at 127). Subsequently, however, the Supreme Court appears not to have followed upon that commentary, at least where the public purpose is not at issue. *Compare Tahoe-Sierra*, 535 U.S. at 315 n.10 (listing three factors), *and Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005) (same), *with Kelo v. City of New London*, 545 U.S. 469 (2005) (city's exercise of eminent domain power to aid economic development plan satisfied constitutional public-use requirement, even though city intended to transfer the property taken from one private party to another private party).

The Corps' denial, however, was targeted to Lost Tree. If an individual or small developer other than Lost Tree had pursued a fill permit for Plat 57, the Corps conceded that they would have received far different treatment than Lost Tree. *See* Tr. 955:5 to 956:16 (Sadowski). Notwithstanding the broad application of the Clean Water Act, the Corps' denial in this instance in effect singled out Lost Tree for adverse treatment. Additionally, in denying Lost Tree's permit for Plat 57, the Corps concluded, after evaluation of the parcel, that Plat 57 "is a high-quality, tidally-influenced, mangrove swamp of the Indian River Lagoon and serves an integral role in the overall health of this partially-impaired watershed." PX 114 at LTVC014041-42; *id.* at LTVC014046 (concluding that the wetlands at Plat 57 are "very high-value"). That finding is suspect, given the trenching and mounding that had occurred on Plat 57 for mosquito-control purposes, *see* Exhibit A, *infra*, and also the Town's and state court's findings that the wetlands involved were marginal. *See supra*, at 15 n.23.

4. *Synopsis.*

Respecting the *Penn Central* factors, the character of the government's action tends to favor Lost Tree because the Corps concededly treated Lost Tree more adversely than it would have treated other applicants for the same permit and because prior mosquito-control actions taken on the property had reduced its value as a wetland. An assessment of the investment-backed expectations is closely divided. Lost Tree admittedly had little expectation regarding Plat 57 when purchased, but the adventitious proposal by The Estuary at McCuller's Point, avail-

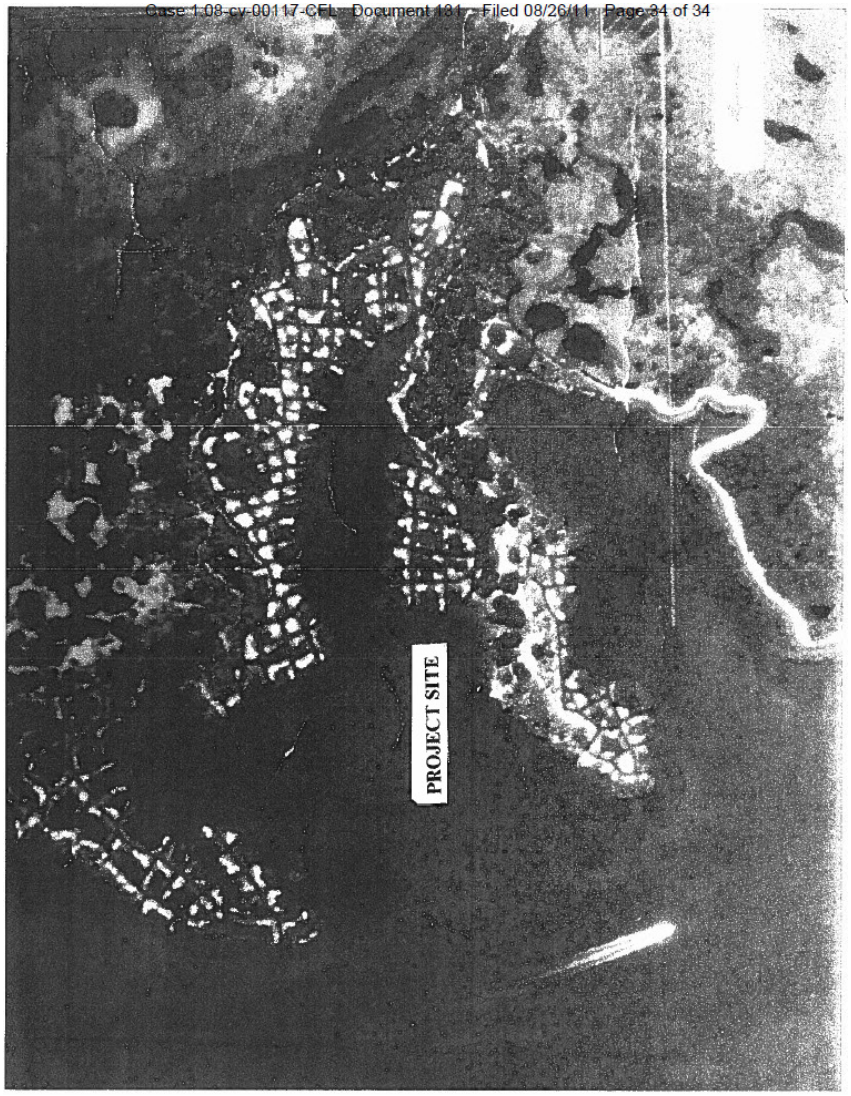
able mitigation measures, and state support in light of those mitigation measures engendered objectively reasonable expectations on Lost Tree's part. Nonetheless, the economic-impact factor is dispositive. A diminution in value of 58.4% due to the regulatory action is insufficient to give rise to a taking despite the weight of the other *Penn Central* factors.

CONCLUSION

For the stated reasons, the court finds that the denial of the Plat 57 Permit Application has not effected a taking of Lost Tree Village Corporation's property. Rather, the court finds that the denial resulted in a noncompensable diminution in the value of Lost Tree's property. The clerk shall enter judgment for the government in accord with this disposition.

It is so ORDERED.

/s/ CHARLES F. LETTOW
CHARLES F. LETTOW
Judge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APPENDIX E

UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-117C

LOST TREE VILLAGE CORPORATION, PLAINTIFF

v.

UNITED STATES, DEFENDANT

(Filed Under Seal: May 21, 2010)
(Reissued: May 27, 2010)

OPINION AND ORDER[1]

LETTOW, Judge.

This action concerns a 4.99 acre tract of land, most of which is a wetland, known as "Plat 57," bordering a cove on the Indian River near the Atlantic Ocean in east central Florida. Plaintiff, Lost Tree Village Corporation

[1] Because this opinion and order might have contained confidential or proprietary information within the meaning of Rule 26(c)(1)(G) of the Rules of the Court of Federal Claims ("RCFC") and the protective order entered in this case, it was initially filed under seal. The parties were requested to review this decision and to provide proposed redactions of any confidential or proprietary information on or before May 27, 2010. No redactions were requested.

("Lost Tree"), sought a wetlands fill permit for Plat 57, which the U.S. Army Corps of Engineers ("Corps") denied on August 9, 2004. Lost Tree claims that the denial of its permit application eliminated all economically viable use of Plat 57 and constituted a taking in contravention of the Takings Clause of the Fifth Amendment. Early in the parties' steps to prepare this regulatory takings case for resolution, they recognized that the key issue centers on defining the relevant parcel of property. To address that salient aspect of the case, Lost Tree has filed a motion for partial summary judgment respecting the proper parcel or parcels of land to be considered in the takings analysis, and the government has responded with a cross-motion on that issue.

Acknowledging that the proper-parcel issue is highly fact-dependent, the parties have submitted extensive joint stipulations of fact accompanied by voluminous documentary exhibits.[2] Accordingly, the question before the court is whether the detailed factual stipulations provide a sufficient background to decide the proper-parcel issue. A hearing on the cross-motions was held on March 25, 2010, during which the court received a detailed explanation of maps and plats that had been included in the parties' submissions. At this juncture, the disputed issue has been submitted for decision on a paper record; the court has neither heard testimony nor visited the pertinent lands.

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[2] The Joint Stipulations will be cited as "Stip. ¶ __."

BACKGROUND[3]

Formed in 1956 as a Florida corporation, Lost Tree was for a considerable period of time a land-development enterprise. Stip. ¶¶ 1-2. During the 1960s, Lost Tree developed Lost Tree Village, a residential community on approximately 450 acres located east of North Palm Beach, Florida. Stip. ¶ 3.

A. *Land Acquisition*

In 1968, Lost Tree shifted its development northward and entered into an option agreement (the "1968 Option Agreement" or "Option Agreement") with the descendants of Fred R. Tuerk to purchase approximately 2,750 acres of property on the mid-Atlantic coast of Florida in Indian River County, near Vero Beach. Stip. ¶¶ 7-8, Ex. A (1968 Option Agreement (Oct. 8, 1968)). The lands subject to the 1968 Option Agreement were located in the general area of the Town of Indian River Shores and relatively near the City of Vero Beach, and were comprised of various parcels, many of which were not contiguous to the largest tract. The Option Agreement covered (1) land on an unnamed barrier island ("Barrier Island") on the Atlantic coast, which island is bisected by U.S. Highway A-1-A, (2) a westerly peninsula of the Barrier Island known as the "Island of John's Island" bordering the Indian River, (3) various other islands in the Indian River, including Gem Island, and

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[3] The recitations that follow do not constitute findings of fact. Instead, the recited factual elements are taken from the parties' stipulations of fact and other filings and are undisputed except where a contrary indication is noted.

(4) upland tracts bordering and near the Indian River, as well as submerged lands. Stip. ¶ 9.[4] The Option Agreement separated the parcels into nine separate conveyances, Conveyances "A" through "I," allowing for the purchases of the property through the exercise of the various options. Stip. Ex. A at LTVC015324 (1968 Option Agreement).

In February 1969, Lost Tree exercised the first of what would be six options pursuant to the 1968 Option Agreement. Stip. ¶ 12. That option covered conveyances "A" and "B" which were located on both sides of U.S. Highway A-1-A on the Barrier Island immediately adjacent to the Atlantic Ocean. Stip. ¶ 21; Plaintiff's Proposed Findings of Uncontroverted Fact ("PFUF") ¶ 21. Between November 1971 and August 1974, Lost Tree exercised options five additional times to acquire the remaining property covered by the 1968 Option Agreement. Stip. ¶ 13. The five additional transactions are reflected in a series of deeds recorded in the Official Books of the office of the Clerk of the Circuit Court of Indian River County, Florida which bear the following dates: February 5, 1970; November 5, 1971 (corrected December 6, 1971 and January 10, 1972); September 7, 1972; September 7, 1973; and August 12, 1974. Stip. ¶¶ 12-13. The last exercised option related to so-called Conveyance "C" and encompassed a significant portion of the Island of John's Island, including Plat 57, the tract involved in the permit

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[4] These upland tracts included approximately 35 acres located about five miles west of Gem Island (the "West Acreage"), Stip. ¶ 9, and 10 acres located about one quarter mile to the north (the "North Acreage"). Stip. ¶ 11.

denial engendering Lost Tree's takings claim, Stip. ¶ 14, and Conveyance "D" which concerned Gem Island. Stip. ¶ 28.

B. *Development of the Community of John's Island*

Although the 1968 Option Agreement mentions a "tentative land development plan depicting the Optionee's proposed development of all of the land that extends from the Indian River to the Atlantic Ocean plus the lands comprising John's Island," Stip. Ex. A at LTVC015300, no overall development plan for the various properties involved with the 1968 Option Agreement has been found. Stip. ¶ 17. Beginning in 1969, and continuing until roughly the mid-1990s, a span of approximately 25 years, roughly half of the 2,750 acres covered by the 1968 Option Agreement was developed on a segmented basis involving many separate plats into what ultimately became a gated residential community known as "John's Island," Stip. ¶ 18, although most knowledgeable people in the vicinity would consider that the community of John's Island includes parcels which were neither covered by the 1968 Option Agreement nor ever owned by Lost Tree. Stip. ¶¶ 19-20.

The first property Lost Tree developed was that covered by Conveyances "A" and "B" on the Barrier Island, purchased in February 1969 in the first of the six options. Stip. ¶ 21. The initial development on the Barrier Island was platted with the Town of Indian River Shores in March 1969 as "John's Island Plat 1," and consisted of the South Golf Course, condominiums, golf cottages, and homes in the vicinity of the South Golf Course. Stip. ¶ 23.

Lost Tree also developed the infrastructure for the Barrier Island property, including streets, utilities, sewage systems, and a sewage treatment facility. Stip. ¶ 22. Lost Tree's development of the Barrier Island continued until the mid-1980s, and eventually included two golf courses located west of Highway A-1-A (Lost Tree built a second golf course in 1970), a beach club on the Atlantic Coast, golf cottages, a private hotel facility, and about 800 individual dwelling units. Stip. ¶ 24. In the course of its development of the Barrier Island, Lost Tree recorded approximately 45 different plats on the Barrier Island. Stip. ¶ 25. The plats covered proposed homesite or condominium "lots" as well as other adjacent property such as wetlands or submerged lands, generally either referred to as "tracts" or as conservation easements. Stip. ¶ 27.

Beginning in the late 1970s, Lost Tree embarked upon the development of what was then a peninsula on the Barrier Island jutting westward into the Indian River, known as the Island of John's Island,[5] and Gem Island located northwest of the Barrier Island and north of the peninsula. Stip. ¶¶ 28, 31. These properties were purchased by Lost Tree in the last of the six options executed on August 12, 1974. *Id.* The first plat for the development of home sites on the Island of John's Island was Plat 25, filed with the Town of Indian River Shores in May 1980 and replatted in 1982. Stip. ¶ 33. In August 1980,

[5] The so-called "Island of John's Island" was connected to the Barrier Island by an isthmus until action was taken in the early 1980s to breach the isthmus with a canal that improved water flow and eliminated stagnant, eutrophic water. *See infra*, at 5 & n.8.

Lost Tree submitted an application (the "1980 Permit Application") to the Corps for a permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and a comparable permit application to the State of Florida's Department of Environmental Regulation. Stip. ¶¶ 44-45.[6] In conjunction with the 1980 Permit Application, Lost Tree submitted a "Development Plan" for the Island of John's Island and Gem Island, Stip. ¶ 34, which included several project drawings. Stip. ¶ 35. The 1980 Development Plan "propose[d] the creation of some 200 single family residences on about 400 acres of land[,] . . . 90% in existing upland areas requiring no governmental regulatory agency permitting," and the "[p]rotection of some 35.37 acres of existing mangrove islands . . . as per John's Island Preservation Society agreement." Stip. Ex. G at LTVCOS0052 (1980 Development Plan). On one of the project drawings, much of Plat 57 was shaded in green and labeled "wildlife preserve." Stip. ¶ 35. No agreement between the entity described as the John's Island Preservation Society and Lost Tree has been found, Stip. ¶ 42, and it appears that the Preservation Society was never formed.

In the 1980 Permit Application, Lost Tree sought approval for various infrastructure improvements, including installation of two causeways, one connecting the existing development on the Barrier Island to the Island of John's

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[6] Florida's Department of Environmental Regulation was in existence from the mid-1970s to the mid-1990s and had responsibility for environmental regulatory activities in the State. It merged with the Florida Department of Natural Resources to form the Florida Department of Environmental Protection.

Island and the other connecting the Island of John's Island to Gem Island. Stip. ¶¶ 43, 47. The Application also addressed construction of several canals including a U-shaped canal that would be located at the southwesterly portion of the Island of John's Island near Chambers Cove, an arm of the Indian River which borders Plat 57, and roughly trace the edge of Stingaree Point and Horse's Head, two small peninsulas extending into the Indian River from the Island of John's Island, and placement of fill in various wetlands to facilitate residential development. Stip. ¶ 43. Although the Corps had determined by the Spring of 1982 that it was prepared to issue a permit for the work envisioned in the 1980 Permit Application, the Corps never acted on the permit application because the State would not approve its version of the 1980 Permit Application without modification. Stip. ¶¶ 49-53.

On August 2, 1982, Lost Tree submitted a revised proposal to the Corps, followed by additional revised plans to the State on October 1, 1982. Stip. ¶¶ 54-55. The new application deleted "all originally proposed project features . . . from th[e] application except the bridge from [the Island of] John[']s [Island] to Gem Island and its approaches." Stip. ¶ 55 (quoting Stip. Ex. K at ID00485 (Modification of Dredge and Fill Application (Oct. 1, 1982))). On December 7, 1982, the Corps issued a permit to Lost Tree which approved only the following infrastructure improvements: (1) construction of a causeway connecting the Barrier Island to the Island of John's

Island;[7] (2) installation of a canal which physically separated the peninsula of the Island of John's Island from the Barrier Island, making the Island of John's Island a separate island; and (3) removal of an earthen plug at the southern tip of the Island of John's Island to allow water to flow from John's Island Sound into the Indian River. Stip. ¶¶ 56-57; Stip. Ex. K at ID00417-442 (1982 Permit (Dec. 7, 1982)).[8]

On July 8, 1983, Lost Tree submitted another Clean Water Act Section 404 permit to the Corps and a corresponding application to State. Stip. ¶¶ 61-62. These applications sought approval to install a causeway and bridge connecting the Island of John's Island with Gem Island. Stip. ¶ 64. The Corps approved the application in November 1984. Stip. Ex. L at ID00831-850 (1984 Permit (Nov. 27, 1984)).[9]

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[7] This causeway is known as the "Sandpiper Causeway," and its purpose was to "provide[] access from the main part of [the community of] John's Island [on the Barrier 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 [go] outside the [gated] community." Stip. ¶ 70 (internal quotation marks omitted).

[8] John's Island Sound is located between the Island of John's Island and the Barrier Island, *see* PFUF Ex. BB at ID00314 (map), and the canal breached the isthmus that had connected the Island of John's Island with the Barrier Island.

[9] Nine years later, in 1993, Lost Tree applied for and received a third permit from the Corps for the construction of a second canal, on the north end of the Island of John's Island, near the Gem Island bridge proposed by the 1984 Permit Application. Stip. ¶ 67.

Jutting off the southern end of the Island of John's Island on the west side is a small peninsula known as "Stingaree Point." Stip. ¶ 30. Plat 57 is located on the north side of Stingaree Point. *Id.* Lost Tree began developing the south side of Stingaree Point in November 1985 when it recorded Plat 40, comprised of six lots on the south and east sides of Stingaree Point. Stip. ¶ 71. Within a few years, these lots had been sold and homes were built on them. *Id.* Access to the six lots on Stingaree Point was provided by a new road constructed roughly up the center line of the Point, called Stingaree Point Road. Stip. ¶ 97. None of the improvements authorized by the 1982 permit were necessary for the construction of Stingaree Point Road or development of the six lots comprising Plat 40. Stip. ¶ 72. At that time, the north side of Stingaree Point, on which Plat 57 is located, was left unplatted. Stip. ¶¶ 71, 110. Lost Tree installed water and sewer lines and "stubbed out" the lines to the six lots comprising Plat 40, but Lost Tree did not stub out such services to the then unplatted area that ultimately became Plat 57. Stip. ¶¶ 102-103. In contrast, Lost Tree did stub out water and sewer service to a tract at the southeastern end of Stingaree Point, which tract eventually became Plat 55. Stip. ¶ 103 An appraisal dated April 30, 1986 stated that the "development [of Stingaree Point] is substantially completed, with the exception of the entrance area, landscaping and a final

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This canal, the Gem Island causeway and bridge, and Gem Island have only a peripheral relevance to the proper-parcel issue currently before the court.

layer of asphalt on the road." Stip. Ex. N at LTVC013533 (John's Island Remaining Real Estate and Related Assets (Apr. 30, 1986)) (evaluating budget to complete development of the Island of John's Island). The appraisal did not consider the area that later became Plat 57 for development.

In 1989, Lost Tree recorded Plat 52, which covered all 40 lots on Gem Island. Stip. ¶ 75. Lost Tree began selling the Gem Island lots to individuals for single family residences in 1990. *Id.* In October 1995, Lost Tree sold the remaining lots on Gem Island to Gem Island Investment LP, an entity owned by some individuals who held interests in Lost Tree. *See* Stip. ¶¶ 4, 76. By 1999, Gem Island Investment LP had sold the remaining Gem Island lots. Stip. ¶ 76. At that time, late in the 1990s, the development of the community of John's Island was substantially complete. Stip. ¶¶ 77-79. Lost Tree had developed and sold approximately 1,380 single-family homesites and condominium units since 1969. Stip. ¶ 78.

C. Termination of Developmental Operations and Disposition of Scattered Parcels and Islands

As development of the community of John's Island neared completion in the mid-1990s the focus of Lost Tree's business changed from real-estate development to management of a portfolio of assets that included some real estate. Stip. ¶ 80. Marking this shift, Lost Tree hired a new company president in 1994, Charles M. Bayer, who became responsible for managing Lost Tree's investment portfolio. Stip. ¶ 81. In 1995, Lost Tree changed its federal income tax status to reflect that it was no long-

er a land developer, and from 1996 onwards it was taxed as a company not in the business of selling real property. PFUF, Attach. 1 (Decl. of Charles M. Bayer (Dec. 17, 2009) ("Bayer Decl.") ¶ 19.[10] In addition to managing Lost Tree's investment portfolio, Mr. Bayer became responsible for addressing the remaining property Lost Tree owned in Indian River County, which principally consisted of the following parcels: (1) the "West Acreage"; (2) the so-called "Lost Tree Islands," in total comprising approximately 500 acres located on scattered islands in the intercoastal waterway; and (3) the "North Acreage." Stip. ¶ 83. Lost Tree also still owned a few small parcels on the Island of John's Island. Stip. ¶ 87. On July 11, 2001, various parcels of properties derived from the 1968 Option Agreement were reserved as conservation easements by deed restrictions recorded by Lost Tree in favor of the St. John's River Water Management District ("SJRWMD"). PFUF ¶ 92A; Bayer Decl. ¶ 23. These parcels included all of Hole in the Wall Island, three large islands in John's Island Sound, and parcels north and south of the Gem Island causeway. PFUF ¶ 92A; *see also* Stip. ¶ 104. Lost Tree also ad-

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[10] "Prior to 1996, in accordance with [S]ection 262(a) of the Internal Revenue Code, Lost Tree had capitalized infrastructure costs, employee and office overhead, and other development costs that benefitted multiple lots and added an allocated share of those costs to the tax basis of property Lost Tree sold." Bayer Decl. ¶ 19. Subsequent to its change of business purpose, Lost Tree treated its operational costs as an expense, which would not have been permissible for a company in the business of developing and selling real property. *Id.* After an audit, the Internal Revenue Service accepted this change in accounting treatment. *Id.*

dressed other property obtained under the 1968 Option Agreement by recording conservation easements in deed restrictions in favor of the federal government, *i.e.*, the Corps, the State of Florida, *i.e.*, the Department of Environmental Protection and SJRWMD, Indian River County, the City of Vero Beach, and the Town of Indian River Shores. PFUF ¶ 92A.

Of the residual parcels Lost Tree still owned on the Island of John's Island, Lost Tree determined that two were developable. Stip. ¶ 87. The first parcel, comprising three lots near the southeastern-most base of Stingaree Point, was recorded as Plat 55 in 1998 and subsequently developed into homesites. Stip. ¶ 88. These three lots were located on upland and no Corps permit was required. *Id.* The second parcel, also consisting of three lots, was located on the small peninsula called Horse's Head, and Lost Tree submitted a Section 404 wetlands fill permit application for this property in July 1997. Stip. ¶ 89. While the permit application was still pending, Lost Tree sold the Horse's Head property to Horse's Head Ltd., a separate entity with a different ownership structure than Lost Tree, which ultimately received a wetlands fill permit from the Corps in 2002. Stip. ¶¶ 91-93. The Horse's Head property was recorded as Plat 54. Stip. ¶ 93.

Subsequently, the so-called "Lost Tree Islands" were sold pursuant to a settlement agreement with the City of Vero Beach and the Town of Indian River Shores, which settlement stemmed from claims Lost Tree had asserted against the City and Town for changing zoning requirements to prohibit road access to those islands. Stip. ¶ 85;

see Lost Tree Village Corp. v. City of Vero Beach, 838 So. 2d 561 (Fla. Dist. Ct. App. 2002).[11]

D. *Advent of Plat 57*

In 2001 and 2002, apart from the dispositions by sales or grants of conservation easements described above, Lost Tree considered whether Plat 57 constituted a developable site. Stip. ¶¶ 104-105. Plat 57 is a 4.99 acre parcel of land located on the north side of Stingaree Point, Stip. ¶ 98, described by the parties as "a mangrove swamp and wetlands that have been disturbed by scattered upland soil mounds vegetated by an invasive species of pepper, and by manmade ditches installed for mosquito control." Stip. ¶ 99. The water present is eutrophic, *i.e.*, rich in nutrients but starved of oxygen, and thus will support only limited flora and fauna. Bayer Decl. ¶ 37. In 2002, Mr. Bayer recommended that Lost Tree develop Plat 57. Stip. ¶ 107. On August 2, 2002, Lost Tree filed an application with the Town of Indian River Shores requesting approval for a preliminary plat and a marginal wetlands determination and conditional use authority for 2.13 acres of wetlands that would need to be filled for the development of one residential lot on the property. Stip. ¶ 110. Lost Tree submitted a Section 404 wetlands fill permit application to the Corps for Plat 57 later that month, on August 23, 2002. Stip. ¶ 111. The Town of Indian River Shores approved a preliminary plat for Plat

[11] The West Acreage was sold to an unrelated developer in 2004, together with some property contiguous to that acreage that Lost Tree had acquired in the 1980s not pursuant to the 1968 Option Agreement. Stip. ¶ 86.

57 that would allow for one residential homesite. Stip. ¶ 115. However, this approval was challenged in Florida circuit court by King Stubbs and Dace Brown Stubbs on the grounds that the wetlands Lost Tree sought to fill were not marginal wetlands. Stip. ¶ 116. Lost Tree intervened in the suit as a third-party defendant, and after a three-day bench trial, in February 2004, the court upheld the Town's approvals for Plat 57 as consistent with the Town's Comprehensive Plan and found that the Town's determination that the wetlands were marginal was supported by substantial evidence. *Id.* On June 28, 2004, Lost Tree submitted additional information to the Corps in support of its permit application. Stip. ¶ 118. On August 9, 2004, the Corps denied that application. Stip. Ex. U (Plat 57 Decision Document (Aug. 9, 2004)).

E. *The John's Island Property Owners Association*

Today, the gated community of John's Island has a homeowners' association known as the John's Island Property Owners Association or "JIPOA," to which over 90% of the homeowners in the community belong. Stip. ¶ 124. As the community of John's Island was being developed, several different homeowners' associations were formed on the Barrier Island, Island of John's Island, and Gem Island, most if not all of which eventually merged into JIPOA. Stip. ¶ 125. JIPOA provides security services, maintenance of common areas, and architectural review of the properties of its members, but owners in the community who are not members of JIPOA are not subject to this architectural review nor are these owners subject to payment of JIPOA's dues or its rules. Stip. ¶ 126. JIPOA is not affiliated with Lost Tree. The

golf club within the community of John's Island, "John's Island Club," runs the two golf courses within the community, as well as a third golf course located approximately ten miles from the main club house in the community. Stip. ¶ 137. The golf club is neither controlled by nor affiliated with Lost Tree. Stip. ¶¶ 138-139. Membership in the John's Island Club and the affiliated beach club is and always has been detached from property ownership in the community of John's Island, requiring separate application to and acceptance by the membership committee of the Club. Stip. ¶ 138. As a result, not all of the residents of the John's Island community are members of the John's Island Club and not all club members are residents of the community. *Id.*

STANDARDS FOR DECISION

Summary judgment is appropriate if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine" if it "may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. A fact is "material" if it might affect the outcome of the case. *Id.* at 248. When deciding these issues, courts view all inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). In disposing of cross-motions for summary judgment, courts evaluate each motion on its own merits and resolve any reasonable inferences against the moving party. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Denial of both mo-

tions is warranted if genuine disputes exist over material facts. *Id.*

In addressing Lost Tree's regulatory takings claim, the court among other things must determine whether the Corps' permit denial precludes *all* economically viable use of the property, amounting to a categorical taking. *See Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380 (Fed. Cir. 2000). This determination frequently depends on how the relevant parcel is defined. *Id.* The resulting relevant-parcel issue is often referred to as the "denominator problem" because, "in comparing the value that has been taken from the property by the imposition with the value that remains in the 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.'" *Id.* at n.4 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). The court's determination respecting the relevant parcel is "a conclusion of law, based on the facts of the case." *Id.* at 1380. Courts have rejected a brightline rule that the relevant parcel, the so-called "denominator" of the takings fraction, is limited to that parcel for which the owner seeks a permit, in favor of "a flexible approach, designed to account for factual nuances." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (citing *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981)).

ANALYSIS

A. *Considerations Pertinent to Determining the Relevant Parcel*

In addressing the relevant parcel or "denominator," a number of considerations can have a bearing, including: (1) the degree of contiguity, (2) the dates of acquisition, (3) the extent to which a common development scheme applied to the parcel, (4) the extent to which the parcel has been treated as a single economic unit, (5) the extent to which the regulated lands enhance the value of the remaining lands, and (6) the extent any earlier development had reached completion and closure. *See Palm Beach Isles*, 208 F.3d at 1381 ("The timing of property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition, is a factor, but only one factor, to be considered in determining the property denominator for analysis"); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (focusing on "the economic expectations of the claimant with regard to the property"); *Loveladies Harbor*, 28 F.3d at 1181 (considering "the timing of transfers in light of the developing regulatory environment"); *Brace v. United States*, 72 Fed. Cl. 337, 348 (2006) (identifying "relevant factual considerations"), *aff'd*, 250 Fed. Appx. 359 (Fed. Cir. 2007).

With regard to the timing of property acquisition and development, there are some parallels between this case and precedents in the Federal Circuit where similar

proper-parcel questions were raised.[12] For example, in *Palm Beach Isles*, a group of investors had purchased 311.7 acres of land in Florida in 1956. *Palm Beach Isles*, 208 F.3d at 1377. All but 50.7 acres of the original 311.7 acres were sold in 1968 to an unrelated developer. *Id.* Palm Beach Isles sought a permit to dredge and fill the remaining 50.7 acres in 1988, the denial of which was the subject of Palm Beach Isles' takings claim. *Id.* at 1378. In determining the relevant parcel to be the 50.7 acres for which Palm Beach Isles sought a permit, the court considered that "[t]he development of [the 261 acres sold in 1968] was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed [for which Palm Beach Isles sought a permit]," and that "[c]ombining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership . . . cannot be justified." *Id.* at 1381. Like the 50.7 acre parcel at issue in *Palm Beach Isles*, Plat 57 is temporally, albeit not physically, remote from the other property on Stingaree Point which Lost Tree developed and sold in the early 1980s.

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[12] The Supreme Court has not spoken directly to the issue presented by this case. The decision of the Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), addresses the timing of acquisition and development compared to the adoption of regulatory measures, but it does so not in determining the proper parcel but rather in the context particularly of evaluating the regulatory takings factor concerned with reasonable investment-backed expectations of the property owner.

Economic aspects of development were particularly important to the result in *Forest Properties*. In that case, a real estate holding company, Big Bear Properties, Inc., had purchased 2,500 acres of land adjoining Big Bear Lake in Southern California. *Forest Properties*, 177 F.3d at 1361. Big Bear also secured an option to purchase up to 200 acres of lake-bottom land. *Id.* After filing a Section 404 permit to fill approximately 9 acres of lake- bottom, to be developed in conjunction with 53 acres of upland, Big Bear transferred the upland to Forest Properties, a commonly-owned entity, and soon thereafter also transferred the option to the pertinent lake-bottom. *Id.* at 1363. The Section 404 permit was ultimately denied, and Forest Properties proceeded with development of the upland. *Id.* at 1363-64. Suit was then filed seeking just compensation for a taking respecting the lake-bottom. *Id.* The Federal Circuit affirmed the trial court's determination that the relevant parcel was the entire 62- acre tract covered by the initial development proposal, notwithstanding the different kinds of ownership in the upland—a fee title—and the lake-bottom—an equitable title derived from the option. The court considered "the economic reality of the arrangements, which transcended these legalistic bright lines." *Id.* at 1366.

Temporal aspects of development were more explicitly the crux of the disputed proper-parcel determination in *Loveladies Harbor*. Loveladies originally acquired a 250-acre tract on Long Beach Island, New Jersey, in 1958, and by 1972, it had developed 199 acres. 28 F.3d at 1174. To develop the remaining 51 acres, it needed to fill 50 acres. *Id.* Negotiations with the New Jersey Depart-

ment of Environmental Protection generated a compromise that would allow developmental use of 12.5 of the 51 acres. *Id.* The development rights in the remaining 38.5 acres were dedicated to the State. *Id.* at 1180. The Corps rejected the fill permit on the acreage subject to the compromise. *Id.* at 1174. In addressing the relevant parcel, the Federal Circuit first eliminated from consideration the land developed prior to 1972. *Id.* at 1181. It also approved the exclusion of the acreage respecting which development rights had been dedicated to the State, leaving the 12.5 acres as the relevant parcel. *Id.*[13]

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[13] An earlier case, *Deltona Corp.*, 657 13 F.2d 1184, which was addressed at some length in *Loveladies Harbor*, *see* 28 F.3d at 1181, raised some temporal considerations but in a context where planned development was continuing. Plaintiff in *Deltona* had obtained two approvals from the Corps for what became Marco Island, Florida, in 1964 and then in 1969. 657 F.2d at 1188. However, when in 1973 it applied for permits respecting three additional segments of planned development, two permits were denied and one was granted by the Corps in 1976. *Id.* at 1188-89. The court rejected a takings claim respecting the two projects as to which approvals were denied, treating the area embraced by those projects as part of the overall parcel subject to the development plan. *Id.* at 1192.

Other cases cited by the parties seem less relevant to the proper-parcel inquiry. In *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991), an investor-developer acquired "Purchase 7," upland and wetland tracts on a barrier island on the southern coast of New Jersey. *Id.* at 311. When the developer filed a takings claim as to the wetland tracts for which a permit was denied, the court considered the entirety of "Purchase 7" to be a single parcel because it was treated by the developer "as a single parcel for purposes of purchase and financing" and rejected the takings claim. *Id.*

A distillation of the considerations providing the bases for decision in the pertinent precedents shows that the primary focus is on the economic reality of development and the relationship of the parcel subject to the regulatory action to the overall developmental pattern. Here, no explicit overarching plan for development was ever prepared, but a definite pattern of development emerged on an opportunistic basis over time.[14] The key question

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In this same vein, *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005), describes economic expectations as a "critical issue" in identifying the parcel as a whole. In *Norman*, developers planned a commercial, industrial, and residential development on a property near Reno, Nevada, comprised of 2,425 acres that had been used for ranching and agriculture. *Id.* at 1085. As part of a mitigation plan, the developers were required to preserve or restore approximately 195 acres of wetlands, and the developer did so by deeding roughly 220 acres to a non-profit property owners' association. *Id.* at 1086-87. The developers sought compensation for the transferred property, but claims for an illegal exaction and for a taking were rejected. *Id.* at 1090-96.

[14] Rather than an implementation of a comprehensive plan, Lost Tree's development of the community of John's Island apparently can be best characterized as an opportunistic progression. Lost Tree developed several different communities over the course of thirty years, beginning with residences and golf courses on the Barrier Island, and, after a hiatus, moving on to the Island of John's Island, and concluding with the development of homesites on Gem Island. Different covenants were recorded for different lots or groups of lots, and, as the different communities within the larger community of John's Island were developed, several different homeowners' associations were formed for those communities, although today most if not all of those associations have merged into JIPOA. Stip. ¶ 125. As discussed *supra*, membership in the

that emerges is whether, and when, the developmental pattern had been completed such that Lost Tree's effort to pursue a Section 404 permit for Plat 57 and the Corps' action in denying that permit should be deemed temporally severed from the preexisting pattern. If it should be so severed, then it might be treated as having a relationship only to the other residual property Lost Tree owned on the Island of John's Island and Gem Island at the time of the permit application for Plat 57. If it should not be so severed, then it would be treated as a small part of the overall tract comprised of the Island of John's Island and Gem Island, as purchased by Lost Tree in 1974 in exercise of the last conveyances under the 1968 Option Agreement.

B. *Concluding Aspects of Development*

Lost Tree contends that Plat 57 should not be coupled with the other developments that had taken place in the past on the Island of John's Island, Gem Island, and the Barrier Island because those developments had occurred some years earlier and Lost Tree sought a permit for Plat 57 when it only owned that property and a very few other scattered small tracts not suitable for development. Pl.'s Mot. for Partial Summary Judgment at 23 ("Pl.'s Mot."). The government contends that excluding previously owned property would contravene the "parcel as a whole" rule derived from *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Def.'s Cross-Mot. for Partial Summary Judgment at 36 ("Def.'s Cross-Mot.").

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golf and beach clubs in the community of John's Island is independent of home ownership in the community.

The government disputes that Lost Tree never had an overarching development plan, Def.'s Cross-Mot. at 34, and it argues that Plat 57 is and was a wetland that provides value to the community of John's Island. *Id.*

Given these competing claims, the progression of Lost Tree's development and the role of Plat 57 are important, particularly insofar as the development of the Island of John's Island and the peninsula known as Stingaree Point at the southern edge of the Island of John's Island are concerned. Lost Tree recorded Plat 40 in November 1985, covering six lots on the south and east sides of Stingaree Point. Stip. ¶ 71. These lots were sold within a few years, *id.*, and that was the last significant development by Lost Tree on the Island of John's Island. Plat 57 is located on the north side of Stingaree Point, but it was not platted at the time Lost Tree developed the other six lots on that peninsula; rather, nothing was then planned for the north side of Stingaree Point. Stip. ¶¶ 102-103. By 1989, Lost Tree had moved on to record Plat 52, covering all 40 lots on Gem Island. Stip. ¶ 75.

Gem Island was the last significant portion in the community of John's Island to be developed. Lost Tree addressed the development of the Barrier Island first, in the 1970s, *see* Stip. ¶ 24, then turned to the Island of John's Island, which was substantially completed by the mid-1980s, *see* Stip. ¶ 74, and finally developed and sold the lots on Gem Island in the late 1980s and early 1990s. *See* Stip. ¶¶ 75-76. The mid-1990s marked the termination of Lost Tree's development operations. At this time, the focus of Lost Tree's business shifted to management of an

investment portfolio, and Lost Tree changed its tax status to suit this new focus. *See supra*, at 6 & n.10.

The government discounts this shift in Lost Tree's focus, emphasizing the facts that Plat 57 was purchased as part of the extensive lands acquired via the 1968 Option Agreement and that Lost Tree reaped significant benefits from development of those lands. Def.'s Cross-Mot. at 38-39. Lost Tree focuses on the circumstances that Plat 57 was a residual property remaining after nearly all of the other lands acquired under the 1968 Option Agreement had been sold and conveyed and that Plat 57 was never a part of any development plan for any of the previously sold plats and tracts. Pl.'s Mot. at 31-34. In making these arguments, the parties largely ignore the dispositions of properties by Lost Tree after it had ceased developmental activities.

C. *Dispositions of Scattered Tracts*

By the mid-1990s, Lost Tree, guided by its new president, Mr. Bayer, was focused on managing Lost Tree's investment portfolio. Stip. ¶ 81. A few residual parcels in Indian River County remained that had been acquired pursuant to the 1968 Option Agreement. Lost Tree undertook sale of three lots comprising Plat 55, recorded in 1998, near the base (or eastern-most part) of Stingaree Point, *see* Stip. ¶ 88,[15] and Plat 54, covering three lots on Horse's Head, for which Lost Tree submitted a Section 404 permit application in July 1997, prior to sale to a

[15] The Stipulations do not address when the three lots comprising Plat 55 were actually sold. *See* Stip. ¶ 88.

development group that successfully pursued that permit application. Stip. ¶¶ 89-93. The so-called "North Acreage" was sold to an unrelated party in 1999. Stip. ¶¶ 84. Conservation easements for islands and wetland parcels were granted in 2001 to various federal and state governmental entities. *See supra*, at 7. Additionally, the Lost Tree Islands in the Indian River were sold as part of a settlement of a zoning dispute with the City of Vero Beach and the Town of Indian Shores. Stip. ¶ 85. After those dispositions, Lost Tree had a relatively attenuated connection to the community of John's Island.[16]

The circumstances of these sales and dispositions, particularly the grants of conservation easements to governmental entities, are not addressed by the extensive stipulations supplied by the parties. Similarly, the parties do not focus on these sales and dispositions in their arguments, although the prior decisions in *Loveladies Harbor*, *Forest Properties*, and *Palm Beach Isles* indicate that these sales and dispositions may be critical to the result in this case. These grants might, or might not, have a bearing on the temporal aspects of Lost Tree's closure of development of, and any continuing relationship to, the property comprising the Island of John's Island and Gem Island, acquired by Lost Tree in 1974, 27 years earlier, under the 1968 Option Agreement, entered 33 years earlier. In short, the record relative to Lost Tree's disposi-

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[16] The later disposition in 2004 of the "West Acreage" to an unrelated party, Stip. ¶ 86, does not alter this conclusion because the West Acreage was about five miles distant from Gem Island, Stip. ¶ 9, and never was associated with the community of John's Island.

tion of property after it ceased developmental operations is deficient.

D. *Plat 57 as an Afterthought*

Located at the edge of the Island of John's Island, Plat 57 is contiguous to, and physically a part of, the community of John's Island. It can be reached by road only by first passing through one of the gates for entry into the community. That factor weighs in favor of treating Plat 57 as part of a larger tract that would, at a minimum, consist of the Island of John's Island, and perhaps include Gem Island as well. However, Lost Tree's attempt to develop Plat 57 was temporally separated from the segmented development of the rest of the community, and the Plat was never anticipated in any of the prior permit submissions for piecemeal development. As early as 1986, Lost Tree's development of Stingaree Point was substantially complete, *see* Stip. ¶ 74, and by that time, Lost Tree had shifted its focus from the development of the Island of John's Island to Gem Island, before converting to an asset management company in the mid-1990s and changing its tax status. *See* Stip. ¶¶ 75-76, 80-81. Except for sale of the "West Acreage" in 2004, which property consisted of about 35 acres of land located about five miles west of Gem Island, Stip. ¶ 83, Plat 57 was a residual parcel that Lost Tree addressed as an afterthought. *See* Stip. ¶¶ 104-110.

Lost Tree filed its applications for permits for Plat 57 with the Town of Indian River Shores and the Corps in August 2002, Stip. ¶¶ 110-111, after it had completed

disposition of other nearby residual properties.[17] Plat 57 appears to have little value in its present state, either environmentally or aesthetically. Rather than enhance the value of the lands around it, *i.e.*, the lots on the east and south sides of Stingaree Point, Plat 57 draws value from those parcels.

E. *Synopsis*

The key then to the relevant parcel determination in this case is found in nuances concerning the degree of completion of Lost Tree's development within the community of John's Island prior to the advent of Plat 57. In denying Lost Tree's Section 404 permit application, the Corps stated that "the project purpose has already been realized through the development of home-sites within the subdivision," Stip. Ex. U at LTVC014016, raising questions regarding the regulatory link between the earlier development and Plat 57. The residuum of land represented by Plat 57 was never part of a permit application submitted by Lost Tree for any part of the Island of John's Island and thus it was not explicitly tied as an economic matter to the properties previously developed, sold, or transferred, except as a surviving relict. Whether Plat 57 was implicitly tied to the prior development, as the government argues, cannot be resolved on the stipulated facts. In this respect, Lost Tree's extensive activity to wind up its presence in the area, including making final sales and grants of easements of the outlying islands and

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[17] As described earlier, the other post-development dispositions of residual properties on the Island of John's Island had occurred in 1997 (Horse's Head) and 1998 (Plat 55).

stray parcels, prior to seeking a permit for Plat 57, raises open questions. Accordingly, the court denies both cross-motions for summary judgment on the issue of the relevant parcel.

CONCLUSION

For the reasons stated, the extensive stipulations of fact filed by the parties are insufficient to resolve issues material to a disposition of this case. Accordingly, plaintiff's motion for partial summary judgment on the issue of the relevant parcel and the government's cross-motion for partial summary judgment on the same issue are DENIED. The disputed issues are remitted for trial. The parties are requested to file a joint status report on or before June 11, 2010, addressing the matters encompassed by RCFC Appendix A, ¶¶ 5 and 12 (last sentence), with respect to preparations for a trial of the material issues in dispute.

It is so ORDERED.

/s/ CHARLES F. LETTOW
CHARLES F. LETTOW
Judge

APPENDIX F

[SEAL OMITTED]

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS
OF ENGINEERS
PO. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

[Aug. 9, 2004]

Regulatory Division
North Permits Branch
SAJ-2002-6731 (IP-IS)

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. Charles Bayer
Lost Tree Village Corporation
4445 A-1-A, Suite 250
Vero Beach, Florida 32963

Dear Mr. Bayer:

This letter refers to the Department of the Army permit application you submitted for authorization to place 1.7 acres of fill in wetlands for the development of a single-family lot in John's Island Development known as Plat 57. The project site is located in John's Island Development in the Town of Indian River Shores on Stingaree Point in Section 13, Township 32 South, Range 39 East, Indian River county, Florida.

The application was assigned number SAJ-2002-6731 (IP-IS).

Your application has been reviewed in accordance with applicable Federal regulations. It was determined during processing of your permit application that less environmentally damaging alternatives were available to you and the project purpose has already been realized through the development of home-sites within the subdivision. As a result of the review, it has been determined that the fill discharge would not be in compliance with the Section 404(b)(1) Guidelines and that the project does not comply with the U.S. Army Corps of Engineers (Corps) Wetland Policy.

Accordingly, it has been determined that your project is contrary to the overall general public interest. Therefore, your Department of the Army permit is hereby denied.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

[SIGNED: Robert M. Carpenter]

Robert M. Carpenter
Colonel, U.S. Army
District Engineer

Enclosures

Copy Furnished:

U.S. Fish and Wildlife Service, Vero Beach, National Marine Fisheries Service, 1339 20th Street, Vero Beach, Florida 32960

St. Johns River Water Management District, 525 Community College Parkway SE, Palm Bay, Florida 32909

Steve Melchiori, 1999 Point West Drive, Vero Beach, Florida 32966

Ernest Cox, Gunster, Yoakley & Stewart, P.A., Phillips Point, 777 South Flagler Drive, Suite 500 East, West Palm Beach, Florida 33401

Statement

of

Findings

CESAJ-RD-NA-M (1145b)
SAJ-2002-6371 (IP-IS)

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Environmental Assessment and Statement of Finding for Above-Numbered Permit Application

1. Applicant: **Charles Bayer**
Lost Tree Village Corporation
4445 A-1-A, Suite 250
Vero Beach, Florida 32963

2. Location, existing site conditions, project description, changes to project:

a. Location: The proposed project site is referred to as Plat 57, located on Stingaree Point in John's Island Development, in Section 13, Township 32 South, Range 39 East, Indian River Shores, Indian River County, Florida. The waters of the United States, (wetlands) at the project site are considered contiguous tidal mangrove swamp within an area of the Indian River Lagoon (IRL) named Chamber's Cove, a navigable water of the United States. This portion of the Indian River is considered a Class III water system, Outstanding Florida Waters and is a designated critical resource water. The terms "Lagoon" "Indian River Lagoon," and "Indian River Lagoon system" refer to the aggregate of water bodies comprising the Indian River proper, Banana River, and Mosquito Lagoon. The terms "Indian River Lagoon region" or "Indian River Lagoon basin" are used to refer to the entire watershed or land area from which water drains. In this discussion "system or ecosystem"

refers to a community of living organisms interacting with one another and their physical environment, such as mangroves, salt marshes, or estuaries

b. Existing site conditions and project history: John's Island was developed by Lost Tree Village Corporation (LTVC) in the 1970s to early 1980s. John's Island is a gated community consisting of upscale home sites many of which have waterfront access along the Indian River. The development includes three (3) golf courses, three (3) clubhouses, beachfront single-family home sites and condominiums. Currently there are over 750 single-family residences within John's Island. In the early 1980's, Lost Tree Village Corporation (LTVC) applied for a permit to dredge and fill to expand their area of development to two islands, west of their existing development (permit number 198001820). The application involved the construction of two causeways, dredging of 15,000 linear feet of canals and the placement of approximately 9.5 acres of fill at 12 sites for residential lots. As part of the mitigation for the proposed work, LTVC offered the preservation of Plat 57 (subject parcel) as a wildlife preserve. LTVC reduced its proposed impacts to the filling for causeways and dredging of 4000 linear feet of canals after the Federal resource agencies recommended the permit be denied. When the proposed work was revised LTVC withdrew Plat 57 as mitigation. A permit was issued for the work on 7 December 1982.

Plat 57 is approximately 4.99 acres in size. The area of Plat 57 considered vegetated wetlands is approximately 3.58 acres and the remaining 1.41 acres is considered submerged lands. The site had been impacted for mos-

quito control purposes by excavation of narrow shallow ditches with the sidecasted spoil creating approximately 30 small spoil mounds (total area approximately 0.5 acre). (All wetland and upland acreage calculations were furnished by the applicant or his consultant(s) who allege the spoil mounds are non-jurisdictional uplands; the jurisdictional limits of the spoil mounds were not verified by the Corps'.) The vegetated wetlands are considered tidal mangrove swamp. The wetlands at the site are considered to be of extremely high quality.

The subject mangrove swamp is vegetated primarily with red mangrove (*Rhizophora mangle*), with smaller components of black mangrove (*Avicennia germinans*), white mangrove (*Laguncularia racemosa*), and buttonwood (*Conocarpus erectus*). The mosquito control ditches are free of vegetation, with the exception of red mangrove prop roots that extend waterward from their banks. The spoil piles are vegetated almost exclusively by Brazilian pepper (*Schinus terebinthifolius*) and Australian pine (*Casuarina* sp.).

c. Initial project description as shown on the application: The applicant proposes to place fill on 2.52 acres of the subject site of which approximately 2.13 acres are wetlands and 0.39 are spoil mounds for the development of one (1) single-family residential unit. The area can be characterized as tidal wetlands, supporting a mangrove community.

d. Changes to project: The applicant recalculated the size of the spoil mounds (not verified by the Corps') to be 0.46 acre. As a result of this recalculation, the

acreage of impacts to wetlands totaled 2.06 acres. The applicant subsequently offered to reduce the impacts to wetlands an additional 0.36 acre to a total of 1.70 acres of impacts to wetlands (2.05 acre fill area minus 0.36 acre of spoil mounds).

3. Project purpose:

a. Basic: The basic purpose of the project is to develop one single-family residential lot.

b. Overall: The overall purpose of the project is to develop an estate size lot with waterfront access in John's Island Development.

4. Scope of analysis: The scope of analysis was limited to the immediate project area.

5. Statutory authority: Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act of 1972, as amended.

6. Other Federal, State, and local authorizations obtained or required and pending:

a. State water quality certification (WQC): The St. Johns River Water Management District (SJRWMD) permit/certification number 4-061-18848-2-ERP was issued on 2 January 2003. Ms. Michelle Reiber of the SJRWMD indicated that her agency was willing to accept the proposal based on the regionally significant mitigation proposed by the applicant. (It is important to note the SJRWMD follows a different method of analysis, which does not include the Clean Water Act 404(b)(1) guidelines of avoidance and minimization sequencing prior to acceptance of compensatory mitigation.) Issuance

of the permit was contingent on the preservation and enhancement of approximately 80 acres of a mosquito control impoundment referred to as McCuller's Point. The proposed preservation area is contiguous to 65 acres of the remaining portion of the impoundment that had previously been placed under a conservation easement and enhanced.

b. Coastal Zone Management (CZM) consistency/ permit: There is no evidence or indication from the State of Florida that the project is inconsistent with the Florida CZM. Issuance of a SJRWMD permit certifies that the project is consistent with the CZM plan.

c. Other authorizations: The Town of Indian River Shores approved the applicant's plan of development for this parcel.

7. Chronology, public notice, and summary of comments:

a. Meetings:

(1) On 6 December 2002, an onsite meeting with Mr. Steve Melchiori was held to discuss the request for additional information and to conduct a site inspection of the subject site.

(2) On 18 September 2003, an onsite meeting was conducted to inspect all available remaining properties owned by LTVC within John's Island Development in an attempt to see if there were any other upland sites at John's Island which could be developed with less impacts to the aquatic ecosystem. Three remaining sites owned by LTVC were inspected and found not to be viable al-

ternatives. Two of the sites did not have access from the road and the third was extremely narrow and small in size. At that time it was revealed that three of the four lots previously permitted in the Horses Head Permit #199704991(IP-IS) had not been sold.

(3) On 8 October 2003, a meeting was conducted to discuss the resource agencies' comments and avoidance/minimization of the impacts as proposed. Representatives were told that the impacts as proposed were told that the impacts as proposed were significant and that it was unlikely a permit for the project would be recommended by this office.

(4) On 24 October 2003, a meeting was conducted at the Corps' Merritt Island Field Office to review LTVC's additional minimization efforts. LTVC representatives presented three (3) site designs (including the submitted plan). The applicant recalculated the acreage of impacts to wetlands proposed (subtracting spoil mound acreage) and found that there was a slight change. The change was a reduction in impact acreage from 2.13 acres to 2.06 acres. The envelope of development, including the spoil mounds, was found to be 2.52 acres. The second design reduced the envelope of development to 2.17 acres, (1.83 acres of wetland impacts without the spoil mounds). The third design reduced the envelope of development to 2.05 acres (1.70 acres of wetland impacts without the spoil mounds). In addition, the applicant requested that the Corps' consider the ditches of little value and subtracted the acreage of the ditches from the wetland acreage. The resulting acreages of the three alternative designs would be 1.47, 1.30 and 1.20 acres, respectively, if

the mounds and ditches were subtracted from the envelope of development. The Corps' indicated this reduction was not adequate.

(5) On 14 November 2003, a meeting was conducted in the Jacksonville Corps' office, at the applicant's request. During the meeting, the applicant's representatives again presented their minimization efforts and acreage totals of the existing upland islands and ditches. They requested that the Corps' consider their minimization efforts as sufficient to justify issuance of a permit. Mr. Collazo requested a site inspection prior to making a decision.

(6) On 15 January 2004, an onsite inspection was conducted for Mr. Collazo's benefit. Mr. Collazo agreed with the field office that the wetlands were extremely high quality wetlands.

(7) On 13 May 2004, a meeting was held at the SJRWMD Palm Bay Office, per the request of the applicant. Sequencing was discussed and the applicant was told that the alternatives site analysis submitted was insufficient. The applicant was instructed to furnish the Corps' with a project purpose and supplement the geographic alternatives analysis. The applicant agreed to furnish the requested information. On 2 June 04, the Corps' sent a letter to LTVC restating the requested information as discussed at the 13 May 2004 meeting.

b. Important dates: The Corps' received the application on 9 September 2002. The Corps' requested additional information on 30 October 2002. The Corps' issued a public notice on 24 January 2003 and sent this

notice to all interested parties including appropriate State and Federal agencies.

c. Public notice comments: The Corps' has reviewed all of the comments submitted in response to the circulation of the public notice. The Corps' has summarized these comments below:

(1) U.S. Environmental Protection Agency (EPA): The EPA did not submit commentary in response to the circulation of the public notice.

(2) U.S. Fish and Wildlife Service (FWS): In a letter dated 18 March 2003, the FWS concurred with the Corps' "may affect not likely to adversely affect" determination for the wood stork and the eastern indigo snake. The FWS stated that the proposed mitigation appears to offer considerable improvements to offshore mangrove/saltmarsh systems. However, it could not evaluate the compensation without evaluating alternatives and observing existing conditions of the mitigation areas. FWS requested an onsite visit to the project site and mitigation areas and recommended the project be held in abeyance.

(3) National Marine Fisheries Service (NOAA Fisheries): In a letter dated 21 February 2003, NOAA Fisheries indicated that an onsite inspection was conducted on 13 February 2003. It stated that the mangrove wetland and estuarine waters of the Indian River, a Class III water system and Aquatic Preserve, would be adversely impacted by the proposed action. In addition, the site is identified as Essential Fish Habitat (EFH). NOAA Fisheries stated that although the proposed mitigation

appears to be substantial, it is concerned that the mitigation would largely involve alteration of existing wetlands and that a net loss of these aquatic sites will result if the project is authorized. Further, NOAA Fisheries has serious questions concerning the appropriateness of the proposed action regardless of the magnitude of mitigation that is planned. NOAA Fisheries quoted Section 230.10(a) of the Environmental Protection Agency's Guidelines for Specification of Disposal of Dredged or Fill Material, which requires that discharge of fill material not be permitted if a less damaging practicable alternative to the proposed discharge is available. In addition, Section 230.10 (a)(3) of the Guidelines calls for the presumption of the existence of a practicable alternative when the proposed action is non-water dependent, as in this case. NOAA Fisheries concluded that an important EFH and affiliated Federally managed species would be adversely affected by the proposed action. Additionally, it indicated that given the value of this habitat type, anticipated adverse impacts would be extremely difficult to offset through mitigation. As such, NOAA Fisheries recommended that DA authorization not be granted.

(4) State Historic Preservation Officer (SHPO): On 4 March 2003, the SHPO indicated that in his opinion, because of the project location and/or nature, the proposed project would have no effect on any sites listed, or eligible for listing, in the National Register of Historic Places, or otherwise of national, state, or local significance.

(5) Organizations:

(a) On 19 February 2003, Pelican Island Audubon Society stated that the project as proposed would do irreparable harm to seagrasses, mangroves and water quality of the Indian River.

On 28 April 2003, the Pelican Island Audubon Society sent a second letter questioning whether the site had previously been used as mitigation in the form of a conservation easement and again strongly urged the Corps' to deny the permit.

(b) On 20 February 2003, Mangrove Garden Foundation discussed the value of a mangrove swamp, and recommended the permit be denied. It also questioned whether the conservation easements proposed as mitigation had been previously used as mitigation for other projects.

(c) On 22 February 2003, the Sierra Club Turtle Coast Group expressed its concerns over the adverse impacts proposed and questioned the applicant's minimization of impacts. It was the group's opinion that the activity would have significant adverse effects on the biodiversity of the Indian River, and urged the Corps' to deny the permit.

(d) On 23 February 2003, the Marine Resource Council questioned if the applicant could further minimization impacts and discussed the value of mangrove systems.

(e) On 18 April 2003, John's Island Property Owners Association, Inc., commented on the public notice

urging the Corps' to deny the proposed dredge and fill permit. The association stated that the mangrove make up a valued community resource. Residents of the community reported an abundance of fish and wildlife both within the mangroves and within the waters sheltered by the mangroves.

(f) On 5 May 2003, Florida Wildlife Federation expressed its opposition to the issuance of a permit for the proposed work. It questioned if the parcel had been used as mitigation for other John's Island projects. The Federation urged the Corps' to deny the permit.

(6) Individuals:

(a) On 13 February 2003, Mr. Michael O'Haire commented on the project and requested the project be denied. Mr. O'Haire also informed the Corps' that the application was the subject of ongoing litigation in the Circuit Court for the Nineteenth Judicial Circuit in Indian River County to enjoin the work.

On 22 August 2003, a report prepared by Environmental Consulting Group, Inc. (ECG), was submitted to the Corps' at the request of Mr. O'Haire and Mr. and Mrs. Stubbs. The report, dated 13 August 2003, was prepared for use in a court case concerning the Town of Indian River Shores authorization to LTVC. The report discusses onsite observations and assessments made by Mr. Reese Kessler, President/Ecologist of ECG. The report challenges the conclusions of BKI and questions the jurisdiction of the mounds. Observations were made by ECG that mangroves were found growing on some of the

mounds, as well as the presence of black mangrove pneumatophores

(b) On 17 February 2003, Captain Jack Jackson express his concerns that projects similar to the one proposed would add to the degradation of the Indian River.

(c) On 4 March 2003, Mr. Anthony Buford commented on the public notice with concerns that the environment will suffer as a result of authorization of this and other projects in wetlands along the Indian River.

(d) On 5 May 2003, Senator Bill Nelson forwarded a letter from Mr. Anthony A. Buford, Jr., for our response. Mr. Buford's letter to Senator nelson expressed the John's Island Property Owners Association objection to the issuance of the permit.

On 2 June 2003, a response was sent to Senator Nelson from Colonel James G. May. The response stated that the comments received during the public notice comment period had been forwarded to the applicant on 12 May 2003 and the Corps' was awaiting a response from the applicant.

(e) On 10 May 2003, Mr. Joseph Zicari requested the Corps' do what it could to prevent development of mangrove areas.

(f) On 13 May 2003, Mr. Lester Tyson expressed his concerns over the loss of wetlands and wildlife in the Indian River.

d. Response to the request for additional information (RAI) and comments:

(a) On 30 October 2002 the Corps' sent a RAI to the applicant. The request included a discussion of the 404(b)(1) Guidelines stating the following under the avoidance section of the letter: "The residential development portion of your project is considered to be a non-water dependent proposal because it does not have to be located in a wetland to achieve the basic purpose. For non-water dependent projects there is a presumption that alternative upland sites exist which are available to the applicant. There is also a presumption that fill placed elsewhere, other than wetlands or other aquatic sites will have less adverse impact. The applicant must rebut these presumptions. Please provide a discussion of alternative sites and why this particular site was selected."

On 25 November 2002, the applicant responded to the RAI. The applicant did not submit an alternatives site analysis with the RAI. In response to the request for a discussion of existing alternative sites the applicant replied as follows: the site had available public utilities, the site would be of least amount of impact to residents of the development due to its location within John's Island and they strongly believe that all land owners have the right to utilize their property for it's highest and best use within the applicable development rules and regulations and as long as any adverse impacts are adequately mitigated.

(b) On 12 May 2003, the comments received in response to the circulation of the public notice were coordinated with the applicant. In addition to discussing the comments received from individuals and the resource agencies, the Corps' commented that the work as proposed would impact extremely valuable aquatic resources. The Corps' stated that the proposed work was not water dependent and it was presumed that practicable alternatives exist. The Corps' again requested an alternative site analysis and asked the applicant to clearly show that the proposed site and site plan was the least environmentally damaging in comparison to any practicable alternative.

The Corps' reminded the applicant of previous statements it had made to the Corps' during the permit review process for the Horses Head LTD 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. The applicant answered that, along with the conservation easements being offered for the Horse's Head LTD 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. The Corps' stated that with the exception of extremely small spoil islands the subject site was a high quality tidal mangrove swamp. The Corps' reminded LTVC that in 1980 the applicant had recognized the wetlands in the subject site

as being of very high quality and had promoted the site as mitigation for then proposed impacts to John's Island. The Corps' also questioned why the other building lots on the same street, which the applicant deemed to be of adequate size for single-family houses were significantly smaller in size than the site in question. The answer was that the site was intended for a far more expensive estate-sized single-family home-site. The Corps' then requested an analysis of alternative site plans; including identification of alternative sites, a method to establish the environmental consequences of each plan, and a narrative justifying the quantity of fill and explaining why it was the minimum amount practicable to achieve the project purpose.

In addition, the 12 May 2003 letter stated the need to examine alternative sites by stating the following: "To satisfy the Section 404(b)(1) Guidelines, additional detail is sometimes required. One of the restrictions on discharges imposed by the Guidelines is that no discharge of dredged or fill material shall be permitted if there is a practicable alternative which would have less adverse impact on the aquatic ecosystem providing the alternative does not have other significant adverse environmental consequences. An alternative is considered to be practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose. If it is otherwise a practicable alternative, an area not presently owned by the applicant but which could be reasonably obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be con-

sidered. When the activity associated with the discharge of fill in a wetland area is not water dependent, practicable alternatives that do not involve wetlands are presumed to be available and less damaging to the aquatic ecosystem unless clearly demonstrated otherwise. It is the applicant's responsibility to clearly rebut these presumptions."

(c) On 30 June 2003, the applicant responded to the Corps'' comment letter. The applicant stated the intent of the project was to allow the landowner a reasonable use of his property. The parcel is zoned R2A, single family residential with a minimum lot size of 15,000 s/f. The applicant stated that considering an owner's right of reasonable use of his land, complete avoidance is not an option. After evaluating the current market value, lot size trends within the community and the impact on adjacent property owners the applicant decided on one large estate lot. In addition, new architectural guidelines have been adopted for John's Island community limiting the size of the home relative to the size of the lot, which has dictated larger lots to accommodate homes comparable in size and style to existing residences. The applicant felt that the wetlands were of low quality and the mitigation offered would be the creation of 2.92 acres of higher quality, un-impounded wetlands elsewhere. In addition the 76.45 acres of impounded wetlands would be reconnected providing wetland access to a much more diverse cross section of fish species. The applicant described its minimization of impacts, which were considered prior to submitting a permit application. Its plans started with six lots, then reduce to

five lots, then three, and finally to one large estate lot. The applicant discussed the remaining three parcels owned by LTVC on Johns Island and how they would not be viable alternatives because access was limited to two of the sites and the third was too small. The applicant acknowledged that Plat 57 was originally proposed as conservation however the mitigation plan was withdrawn. The applicant listed all the Conservation Easements recorded within the John's Island Development. The applicant maintained that the overall plan would be in the public interest because the mitigation effort proposed would have a positive impact on the Indian River over a large geographic area.

The applicant's consultant B.K.I., Inc., Consulting Ecologists (BKI) responded to questions and comments in the Corps'' 12 May 2003 letter. BKI went into detail concerning the proposed mitigation and how the applicant's efforts would enhance/restore wetlands to provide more diverse wetland functions and wildlife habitat than the Plat 57 site. BKI described Plat 57 as a disturbed wetland that has been impacted with scattered upland spoil mounds and a network of manmade ditches. The spoil mounds were vegetated by invasive exotic species and provide virtually no habitat value (questions concerning the determination that the spoil mounds are truly uplands were made in the 13 August 2003 ECG report (see 7c(6)(a)). Adverse wetland impacts had been minimized by limiting the extent of fill to the interior of the site where water quality is at its lowest. BKI found that water quality was approximately 86% reduced in the project area based on its observation of dissolved oxygen

and high turbidity Benthic organism diversity was alleged to be approximately 80% reduced in the project area based on samples taken by BKI. BKI found fish diversity to be 35% reduced and avian species 43% reduced based on observations, sampling and trapping. BKI estimated that overall floral and faunal biodiversity was approximately 32% reduced in the project area. Furthermore, BKI noted that the ditches severely limited the nutrient export and flushing dynamics of the wetland, allowing deep deposits of low-quality highly turbid loose silt to develop throughout the ditch system (this conclusion was questioned in the EGG report dated 13 August 2003 (see 7c(6)(a)).

BKI stated that studies by various researchers have confirmed that many of the characteristic indicators of wetland quality are significantly reduced within the proposed project contour relative to baseline data taken outside the proposed fill area. The studies referenced above were conducted by BKI, with assistance from other researchers, in September of 2002. Their findings were submitted on 25 November 2002 in a document entitled "Comprehensive Wetland Assessment of Wetlands at Stingaree Point, September 2002."

The introduction presented in the assessment indicates that the data is a "snapshot" of the then current ecological characteristics and should not be interpreted as representative of all, potential seasonal, meteorological, and historical variations in the systems sampled. However, BKI draws conclusions regarding the quality of the wetland system, primarily as a result of this assessment.

It is the Corps'' opinion that these data are not determinative of the quality of the subject wetland, but should be considered along with other data. Sampling for the assessment was conducted within a one-week period during the month of September. Typically September is the hottest month of the year, therefore skewing the dissolved oxygen (DO) results. In addition, peak water levels were not likely present during the sampling events because astronomical tides and rainfall accumulations had not peaked. Presumably, this is why the ditches were sampled versus the mangrove system. Specific information was not provided with respect to the actual sampling depth for DO. This information will either be on the Chain of Custody laboratory form or in the field sampler's notebook. There is likely a difference between DO concentrations on the ditch bottom versus air/water interface.

While DO concentrations obtained during low and high tides were averaged, it would be valuable to see high tide DO data for the ditch system. Overall, the ditch DO levels may be affected by surrounding groundwater conditions. During low water conditions the ditch may be comparable in DO and oxidation/reduction (redox) potential to the adjacent muck soils, a strongly reducing environment. Similarly, when the adjacent mangroves are flooded, there is likely little or no difference between the two areas. To say that the organic material in the ditches is the result of "pollutants from untreated wastewater" is extremely inaccurate. The ditches function as a sink for autochthonous organic material (i.e., material generated from within the system), prior to discharge to

the IRL. Given enough time, these ditches will likely fill in and support mangroves.

Overall, comparisons between the IRL/mangrove interface and interior sites are invalid comparisons, given they are entirely different habitats. A more appropriate comparison would be the interior sites versus the interior of an "unaltered" mangrove system. Results from fish sampling in the ditches were particularly encouraging given the antecedent conditions and apparent DO conditions. However, since no sampling methodology was presented for fish and invertebrates the study would be hard to replicate

The Corps' disagrees that "construction of the ditch system has severed the connectivity of the mangrove marsh to sources of terrestrial nutrient runoff and limited the primary influence of tidal variations to the ditch system itself." The adjacent upland contributing area is so small that it appears to be insignificant in regard to mangrove system function. The forcing function for this system is simply tidal conditions. The ditches are below the grade of the mangrove surface. Therefore, tidal conditions functioning below the ground surface elevation will only interact with the ditches, simply because of the lower elevation. However, peak seasonal hydrologic conditions will flood the mangrove areas, regardless of the ditches.

In conclusion, BKI alleged that the ACOE (Corps') and NMFS (NOAA Fisheries) generalized opinions regarding the quality of the subject site and Essential Fish Habitat were not supported by BKI's research. BKI felt that

there was sufficient evidence to establish the impacted and ecologically, compromised status of the subject site wetlands. BKI went on to describe the significant value of the proposed mitigation and how the SJRWMD unanimously approved and permitted the site and had concluded that the project as proposed provides a net environmental benefit that is regionally significant. And it is BKI's opinion that the project as proposed is in the public interest.

(d) On 9 October 2003, a letter was sent to the Corps'' from Ernest A. Cox (applicant's attorney) which discussed the similarities of the Horse's Head project (Plat 54), previously authorized by the Department of the Army, and the current proposal (Plat 57). Mr. Cox discussed the combining of the three single-family lots (Horse's Head, Parcel B) to one lot after negotiations with the Town of Indian River Shores. Mr. Cox also discussed how the combining of the three lots led the applicant to proposing one larger lot for Plat 57

(e) On 2 June 2004, a letter was sent to LTVC referencing the 13 May 2004 meeting and the Corps'' concerns. The Corps' requested that LTVV supplement the geographic alternatives analysis and re-define the project purpose.

(f) On 8 June 2004, LTVC requested an extension of time, to 25 June 2004, to respond to the request for additional information. The Corps' agreed to the requested extension.

(g) On 25 June 2004, LTVC requested an extension of time, to 2 July 2004, to respond to the request for

additional information. The Corps' agreed to the requested extension.

(h) On 28 June 2004, LTVC replied to the 2 June 2004 request for additional information. The applicant defined his project purpose as follows: "to create one new estate size waterfront homesite within the Island portion of John's Island Community."

The applicant discussed the project history, which began in the late 1970's with the development of a master plan that consisted of four canals, two causeways, numerous bridges and the filling of four large areas of wetlands and the excavation of various upland lakes. The project was put out on public notice in May of 1981. The applicant stated that because of the complexity of the application it was mutually agreed between the agencies and the applicant that the plan as submitted be withdrawn and individual permits for components of the plan be submitted and reviewed independently. This is why the development on the Island proceeded as separate parcels, plats or sections.

The first individual permit for the Sandpiper Lane Causeway and John's Island Sound flushing channel was submitted and approved. The Gem Island Bridge and causeway was next. Three additional applications were submitted, the first was Plat 53, the canal adjacent to lots 146-150 in 1993, followed by Plat 54 in 2000 and the final current proposal at Plat 57.

The three remaining parcels owned by LTVC were identified as Areas 1, 2, and 3. The applicant discussed why the three parcels were not viable alternatives. Area 1

was isolated from the roadway, Stingaree Point, by a utility easement tract that has been deeded to the John's Island Property Owners Association. In order to cross this parcel LTVC would have to get title to this land back from the Property Owners Association. In addition, the site is not waterfront and therefore did not meet the project purpose of creating a waterfront home-site. Area 2 is approximately 3.5 acres of mangrove along Manatee Cove. LTVC sold the road frontage to this parcel to the property owners on the west side of Manatee Cove. LTVC would have to purchase the house and tract from a private individual in order to gain access to the property. LTVC felt that development of this site would result in greater wetland impacts while producing a building site that does not conform to the project purpose. Area 3 at the south tip of Gem Island is currently dedicated to the Property Owners Association as a landscape tract. In order to develop this site, LTVC would have to have the approval of not only the Property Owners Association but also every lot owner within the Gem Island Plat. In addition the site has size limitations. The average width of the upland portion is approximately 50 feet. There is also a mangrove fringe of approximately 65 feet. Taking into account the required buffers and setbacks, only a 30 foot deep building pad would be left and would not meet the project purpose.

In conclusion, the applicant felt that the project as proposed would be the best alternative. It meets the project purpose, requires the least amount of environmental impacts and provides LTVC with reasonable use of their land. With the commitment that no additional develop-

ment dependent filling within John's Island Community would occur and completion of a mitigation package with regional environmental enhancements, LTVC believes the project meets the requirements for permit issuance.

e. Additional coordination of project revisions: The project was not revised significantly enough to coordinate the revisions.

8. **Alternatives:**

a. Avoidance:

(1) The "no-action" alternative would allow the wetlands at the site to remain in their current state. The Corps' maintains that the applicant has exhausted all alternatives with the previous permit actions and that with the issuance of these permits the applicant has had reasonable use of his land.

(2) On 30 October 2002 and 12 May 2003, the Corps' requested the applicant furnish the Corps' with an alternative site analysis. The applicant did not furnish the Corps' with the requested analysis. In both responses the applicant maintained its rights as a landowner to utilize its property for its "highest and best use," which it interprets as housing. On 13 May 2004, the Corps' met with the applicant and requested the applicant furnish the Corps' with a supplement to its geographic alternatives site analysis and re-define its project purpose. On 2 June 2004, the Corps' sent a letter requesting the additional information as discussed in the 13 May 2004 meeting. The applicant responded on 28 June 2004 by re-defining the project proposed, discussing the

project history, and discussing three alternative sites it currently owned, and explained why the three sites were not viable alternatives (see 7d(g) above).

(3) Upon examination and discovery it was found that three of four waterfront lots previously authorized by DA permit 199704991(IP-IS) (Plat 54) had not been sold and were available to the applicant as single-family residential home sites. Further investigation disclosed that the Town of Indian River Shores required the three lots be combined as one, making the lot an estate-sized lot approximately 1.6 acres in size.

b. Minimization: The applicant offered to minimize impacts to wetlands by 0.36 acre. Since the site is 90% tidal wetlands there is little opportunity for minimization.

c. Project As Proposed: With the minimization efforts made by the applicant on 24 October 2003, the project would eliminate approximately 1.7-acres of high quality, tidal, mangrove swamp wetlands.

d. Conclusions of Alternatives Analysis: The applicant is a subdivision developer and does not intend to build his personal residence at the subject site. The proposal is a speculative profit-driven enterprise. The Corps' believes that the LTVC has had very reasonable use of its land at John's Island pursuant to prior DA authorizations. Previous permits issued to LTVC and Horses Head LTD includes the construction of causeways, excavation of canals and the placement of fill for the development of 4 single-family lots (Horse's Head, Plat 54). One of these lots has been sold; however, re-

cent property records show that the three remaining lots, which are adjacent to each other, are currently in the ownership of Horses Head LTD, a corporation established for the 4 single-family lots. Charles Bayer the current president of LTVC is also the president of the Horses Head LTD.

The Corps' agrees that the three parcels (Areas 1, 2, and 3) owned by LTVC and discussed in the applicant's response of 28 June 2004 (see 7d(g)) may not be viable alternatives. However, the Corps' believes the applicant has not avoided impacts to wetlands to the maximum extent practicable, as a less environmentally damaging, practicable alternative exists in consideration of the overall project purpose. Among other alternatives available, the applicant currently owns three single-family residential lots permitted by DA permit number 199704991 (IP-IS). It is clear the applicant has piecemealed his development and that reasonable use of the property has been achieved.

9. Evaluation of the 404 (b) (1) Guidelines:

a. Factual determinations:

(1) Physical substrate (230.11(a): The wetlands at the site consist of the tidally influenced, mangrove swamp. Hydric soils within this area are well-developed histosols with a significant amount of organic material within the upper profile of the soil.

(2) Water circulation, fluctuation, and salinity (230.11(b)): The wetlands at the site are tidal and are inundated seasonally during periods of high tide. On 16 September 2002, a study submitted by the applicant indi-

cated little variation in salinity between the IRL and the mangrove wetland.

(3) Suspended particulate/turbidity (230.11(c)): The wetlands at the site contribute to a reduction of suspended particulates and turbidity within the IRL.

(4) Contaminant availability (230.11(d)): It is assumed that any fill discharged would be free of contaminants.

(5) Aquatic ecosystem effects (230.11(e)):

(a) Structure of ecosystem. The project site is a tidal mangrove wetland complex with less than 10% exotics present (limited to small spoil mounds). Mangrove plants provide the litter that forms the backbone of the estuary ecosystem. It is estimated that one acre of mangroves produces 3.6 tons of leaf litter per year. The litter is mostly leaves, bark, twigs, and root material that all decompose and form the basis of the food web. Bacteria and fungi decompose the organic material into detritus, which is flushed into the estuary by the outgoing tides. The mosquito control ditches onsite facilitate the transport of detrital material to the estuary. The detritus is eaten by zooplankton, which is in turn eaten by larger animals. Larger predators, including humans, eat the animals that feed on zooplankton. The loss of mangrove wetlands erodes the base of the estuary ecosystem.

(b) Ecosystem functions. Mangrove wetlands are Essential Fisheries Habitat (EFH) for a variety of commercially important fish species. Mangroves provide forage, refuge, nursery and maturation require-

ments of a variety of aquatic species. Red mangroves form a network of prop roots that trap debris creating new land. Oysters attach to these roots where they are covered during high tide. Raccoons can feed on these oysters at low tide. Fiddler crabs burrow in the mud beneath the roots. Birds that roost or nest in the mangroves, not only provide organic matter in the form of guano, but also feed on crabs living in the mangroves. Small baitfish feed on the algae attached to the roots of the mangrove. Larger game fish such as redfish, snook, and trout feed on the baitfish. Mangroves also serve as valuable nursery areas for shrimp, crustaceans, mollusks, and fish, providing a critical link in Florida's commercial and recreational fishing industries. The project would have negative impacts on the aquatic ecosystem affecting both the importance of the site for EFH and the importance of the site for filtering contaminants, contributing to biomass accumulation, carbon storage, nutrient cycling, primary production, and providing habitat.

(c) Recreational and commercial fisheries. The project site is located in mangrove wetlands that are EFH for postlarval and juvenile red drum, white shrimp, pink shrimp, brown shrimp, and adult summer flounder. Mangrove wetlands are also utilized by black drum, Atlantic menhaden and blue crab. Allowing development in mangrove wetlands would set precedent and set the stage for additional development of privately owned mangrove wetland areas. The cumulative effect of development would erode wetlands critical for the development of many recreationally and commercially important fish species. It is estimated that over 70 percent of game

fish and commercial species in Florida are dependent on the mangrove ecosystem during part of their life cycle.

(d) Special aquatic sites. The proposed project site is located in a special aquatic site, mangrove wetlands, which provide high value aquatic ecological functions. Mangrove ecosystems lie at the interface of land and sea, and provide an important role in stabilizing sediments. Red mangroves have drop roots that extend from branches and upper parts of the stem, black mangroves have a system of cable roots that radiate outward for many feet from the stem base, and white mangroves have less developed rooting mechanisms but also help stabilize sediments.

(e) Wildlife. The project site provides habitat for arboreal, intertidal, and subtidal organisms including: mammals, birds, reptiles, fish, amphibians, invertebrates, and crustaceans. Mangroves provide a variety of hard and soft bottom habitats for a diversity of invertebrate life. These invertebrates feed on leaf litter, detritus, plankton, and other small animals. A variety of invertebrates live in or in close proximity to mangrove root systems, including: snails, barnacles, mollusks, sponges, isopods, amphipods, shrimp, crabs, and jellyfish.

As mentioned in 5(c) above, mangroves support a variety of fish species by providing a food source and refuge.

Mangroves provide habitat for a variety of amphibians and reptiles, including: the American alligator (in low salinity areas), mangrove water snake, Florida green water snake, eastern indigo snake, rosy rat snake, Florida rough green snake, Florida banded watersnake, Flor-

ida king snake, eastern cottonmouth, anoles, giant toad, squirrel tree frog, and Cuban tree frog.

Many species of birds utilize mangroves for food, roosting, and nesting. Birds commonly associated with mangroves include: herons, bitterns, spoonbills, limpkins, ibises, brown pelicans, anhingas, mallards, cormorants, turkey vulture, black vulture, red-tailed hawks, red-shouldered hawks, marsh hawks, American kestrels, barn owls, and great horned owls.

A variety of mammals utilize mangrove habitats , including the gray fox, bobcat, skunk, raccoon, mink, river otter, opossum, and marine mammals. Dolphins feed on fish associated with mangrove systems and forage near mangroves. The manatee feeds on submerged aquatic plants and seagrasses in close proximity to mangroves.

(6) Proposed disposal site (230.11(f): The proposed fill site is a high-quality, tidally-influenced, mangrove swamp of the Indian River Lagoon and serves an integral role in the overall health of this partially-impaired watershed.

(7) Cumulative effects (230.11(g):

(a) Other similar projects (historical) in area/watershed. The applicant was issued a DA permit on 24 September 1998 to construct 4 single-family lots. One of these lots is considered an estate-sized lot approximately 1 acre in size and the remaining three were approximately 0.5 acre each. At that time the applicant assured the Corps' that any other development of lands owned by the applicant at John's Island Development would be on parcels, which have developable uplands.

The applicant, under the corporation name Horses Head LTD, currently owns the three smaller lots that were issued by permit No. 199704991 (IP-IS). The Town of Indian River Shores has required Horse's Head LTD to combine the three lots to meet building requirements. Currently, the three lots total approximately 1.6 acres and constitute an estate-size lot, which has waterfront access.

(b) Anticipated similar projects in the area/ watershed. The importance of mangroves and their contribution to the overall health of Florida's eastern coastal zone cannot be overemphasized. Although additional regulations have been enacted by state and local governments to protect this important natural resource, individuals and developers continue to propose construction in this highly sensitive and ecologically valuable environment. Additional projects in this area with mangrove impacts would be very likely if this permit were issued, establishing a precedent for housing fills in high value mangrove systems.

(c) Anticipated future consequences. The central east Coast of Florida has one of the fastest growing populations in the United States. It is estimated that almost 80% of Florida's new residents settle on coastal regions. The Florida Department of Natural Resources has estimated that the IRL has lost approximately 80% of its mangrove/marshes and 30% of its seagrass beds.

There is little waterfront property with navigable access along the shoreline of the IRL. Should this project be

issued as proposed, a precedent would be set for loss of other remaining areas along navigable waters. It is anticipated that other property owners would use the authorization of the project as justification for development in similar environments. Further development and elimination of wetlands along partially impaired aquatic systems would adversely affect water quality in the Lagoon system and would cause an overall reduction of water quality within the IRL.

Allowing development in areas that are mangrove wetlands would set precedent for future mangrove loss. The loss of mangroves would remove the food source for a variety of marine life such as shrimp, crab and fish. Loss of this important aquatic resource would decrease the productivity of the IRL.

(8) **Secondary effects:** Further development along the IRL will increase sedimentation, pollutant load, and possibly contribute to septic seepage into the IRL system. The proposed development in this area would result in secondary effects that could permanently damage the aquatic ecosystem.

b. Restrictions on discharges:

(1) Alternatives (See paragraph 8):

(a) The activity is located in a special aquatic site (wetlands, sanctuaries and refuges, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, etc.) yes (x) no ( )

(b) The activity needs to be located in a special aquatic site to fulfill its basic purpose. yes ( ) no(x)

(c) It has been demonstrated in paragraph 8 above that there are no practicable or less damaging alternatives, which would satisfy the project's overall purpose. yes ( ) no (x)

(2) Other program requirements:

(a) The proposed activity violates applicable State water quality standards or Section 307 prohibitions or effluent standards. yes( ) no(x) The SJRWMD issued an Environmental Resource Permit No. 4-061-18848-2 ERP on 2 January 2003. The permit also constitutes certification compliance with water quality standards under Section 401 of the Clean Water Act, 33 U.S.C. 1341.

(b) The proposed activity jeopardizes the existence of federally listed threatened or endangered species or affects their critical habitat. yes ( ) no(x) The project was coordinated with the USFWS and the NOAA Fisheries. The project will not jeopardize the continued existence of federally listed threatened or endangered species.

(c) The proposed activity violates the requirements of a federally designated marine sanctuary yes ( ) no (x)

(3) The activity will cause or contribute to significant degradation of waters of the United States, including adverse effects on human health; life stages of aquatic organisms; ecosystem diversity, productivity and stability; and recreational, esthetic, and economic values. yes(x) no( ) The loss of this very high value estuarine/marine

ecosystem is likely to affect its inherent value as well as the ecological value of IRL.

(a) Life Stages of Aquatic Organisms: As indicated throughout this document, removal of these mangrove areas would have an adverse impact on EFH thereby resulting in an adverse impact to the life stages of the finfish and shellfish that utilize mangrove systems for major portions of their existence from juvenile stages to adult stages.

(b) Ecosystem Diversity, Productivity and Stability: Completion of the project would eliminate most of this project site from contributing to the ecosystem of the IRL. The cumulative effect of the development of areas that are almost entirely mangrove wetlands would have very significant adverse effects on ecosystem diversity by decreasing habitat, reducing shoreline stability, and reducing the export of detritus. There exists the strong possibility that a precedent could be set to develop such coastal areas that are predominantly tidal systems.

(c) Recreation: Over the long term and considering other such systems being similarly developed, recreational activities such as sport and commercial fishing and shell fishing could be adversely affected through the elimination of nursery, forage, and protection areas afforded by these types of systems.

(4) Minimization of adverse effects:

(a) Appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem. yes ( ) no(x)

(b) Compensatory mitigation: To compensate for the 1.7 acres of wetland impacts, the applicant proposes the following:

(1) The creation of 2.92 acres of mangrove forest in three unimpounded areas.

(2) Wetland enhancement, via Brazilian pepper eradication, of 2.20 acres. Additional wetland enhancement is proposed to occur in 76.23 acres within the McCuller's Point impoundment, which consists of the installation and implementation of a RIM management plan. This plan provides for the installation of 5 - 30" culverts and risers in accordance with the specifications provided by the Indian River Mosquito Control District and the clearing of the perimeter dike of invasive/exotic species to provide access around the property. An agreement between Lost Tree Village Corporation and the Indian River Mosquito Control District assures that the impoundment will be managed in perpetuity and will be executed as required by the SJRWMD permit. This along with a similar agreement between the Indian River Mosquito Control District and the Estuary development will allow the enhancement of the entire McCuller's Point Impoundment.

(3) In addition to the creation and enhancement described above, 118.32 acres will be encumbered by conservation easements in favor of the St. Johns River Water Management District. They are 98.10 acres associated with McCuller's Point, 11.33 acres east of Gem Island, and Tracts I, 6, 7 and 11.

(4) The final component of the mitigation plan is preventing the direct discharge of untreated stormwater into the Indian River Lagoon and providing repairs to the Town of Indian River Shores drainage outfall system by upgrading the discharge pipe from Indian Lane diversion structure from 18" to 36" and repairing the existing weir.

c. Findings: The project does not comply with the Guidelines because there is a practicable alternative with less effect on the aquatic ecosystem, and the project purpose has already been realized through development of home-sites within the subdivision. The Corps' believes that issuing the project would contribute to significant degradation of a very high-value aquatic ecosystem that is part of the IRL ecosystem. Impacts to mangrove wetlands should be avoided because of the functions described in paragraphs 9a(5),10a(1) and 10a(4).

10. Public interest review:

a. Public interest factors: The Corps' reviewed all of the public interest factors. The Corps' considers the public interest factors identified below as relevant to this proposal. The Corps' considered both cumulative and secondary impacts on these public interest factors.

(1) Conservation: Primarily due to its unique location at the boundary between the temperate and subtropics zones, east central Florida's IRL system has more species of plants and animals than any other estuary in North America (Gilmore, 1985), supporting more than 3,000 species of animals and plants (the most

diverse bird population found in North America). One of the main reasons for this diversity is the large number of habitat types in the IRL. The presence of many different types of habitats makes the high diversity of the IRL possible (EPA web). The IRL estuary consists of three major basins; the Banana River, Mosquito Lagoon and the Indian River Lagoon itself. In 1990, the U.S. Environmental Protection Agency designated the Indian River Lagoon estuary an "Estuary of National Significance." On 30 April 1991, the Indian River Lagoon National Estuary Program (IRLNEP) was formed. The Federal Water Pollution Control Act of 1972 (Clean Water Act) was amended in 1987. Passage of the Water Quality Act of 1987 signaled recognition by Congress that many of the nation's estuaries were in poor health and in need of protection. Section 317 of the act declares that increasing population in the coastal zone, development and other direct and indirect uses of estuaries threatened their continued health. This section also states that it is in the national interest to maintain ecological integrity of the nation's estuaries. It was Section 320 of the act that initiated the National Estuary Program (NEP). The NEP was developed to identify nationally significant estuaries threatened by pollution, development or overuse, and to promote the preparation of comprehensive management plans to ensure their ecological integrity. The programs' goals are the protection and improvement of water quality and enhancement of living resources.

The IRL stretches approximately 150 miles from Ponce de Leon in Volusia County to Jupiter inlet in Palm Beach County and makes up 40 percent of Florida's east Coast.

The IRL is an estuary, which is semi-enclosed where freshwater mixes with salt water. More than 70% of Florida's commercial and recreational fish, shellfish, and crustaceans are estuarine dependent (spend part of their life cycle in the estuary).

Recently, the IRL Comprehensive Conservation (and Management Plan (IRLCCMP) was adopted to guide restoration efforts in the IRLNE. The IRLCCMP contains 68 recommended actions addressing critical problems such as preservation of wetlands, water and sediment quality improvements, land acquisition needs, and the means of funding preservation and restoration activities. The IRLCCMP identifies Programs Goal Two as, "to attain and maintain a functioning healthy ecosystem which supports endangered species, fisheries, commerce and recreational." The "Wetland Action Plan" (W) states, "To preserve, protect, restore and enhance the wetland resources of the Indian River Lagoon basin." The cumulative impacts to the IRL resulting from this and similar projects will be contrary to the goals of the IRLNE to preserve and protect the lagoon system. The continued development of single-family residences along the shoreline of the IRL will result in decreased wildlife habitat, negative effects on fisheries, and the degradation of water quality. The goals and objectives of the IRLCCMP should be considered an important supplemental technical document to this Statement of Findings (SOF) .

(2) Economics (33 CFR 320.4(q): Completion of the proposed project would likely employ some skilled labor; however its impacts on the overall economy and

tax base of the Town of Indian River Shores would be negligible. The amount spent on fishing in the IRL is estimated at $65 million per year. The IRL is a major saltwater fishing destination for sportsman from throughout the United States. The IRL's water quality and habitat value are dependent upon the wetlands along its shorelines. Development on and around the IRL is causing extreme pressure on the health of the IRL. The value of properties along the IRL would suffer should fish and wildlife populations be diminished and water quality be degraded. Projects that impact or diminish this important economic resource without overwhelming public benefits should be considered contrary to the public's economic interests.

(3) Aesthetics: Numerous homes exist within Johns Island, as such, it is unlikely that the proposed project would have an adverse impact on aesthetics at the proposed work site.

(4) General environmental concerns (33 CFR 320.4(p)): The proposed project would impact red, black and white mangrove wetlands that are subject to the tidal influence of the IRL. Mangrove wetlands are EFH for a variety of commercially, recreationally, and ecologically important fish species and a variety of marine life those species prey on. Mangrove wetlands also provide valuable water quality maintenance and shoreline stabilization functions. Overall, completion of the project would be contrary to the public interest in terms of general environmental concerns.

The Indian River Lagoon system, which includes the Indian River, Mosquito Lagoon and the Banana River, has been included in the National Estuary Program. As previously mentioned, the IRLCCMP was developed to outline an approach to restore and protect the Lagoon. The IRLCCMP is a research supported list of problems that are causing the degradation of the Lagoon and has a set of policies and objectives designed to correct these problems. The Corps' is obligated to participate in the Ecosystem Management approach in its review of permit applications and have its decisions be consistent with the best ecosystem management objectives available for the area. The IRLCCMP is considered the management plan for the entire Indian River Lagoon system. This permit decision is consistent with the objectives of the IRLCCMP.

The proposed project would eliminate approximately 1.7-acres of tidally influenced mangrove swamp. Mangrove plants provide the litter that forms the backbone of the estuary ecosystem. It is estimated that one acre of mangroves produce 3.6 tons of leaf litter per year. The litter is mostly leaves, bark, twigs, and root material that all decompose and begin the food web. Bacteria and fungi decompose the organic material into detritus, which is flushed into the estuary by the outgoing tides. The detritus is eaten by zooplankton, which is in turn eaten by larger animals. Larger predators, including humans, eat the animals that feed on zooplankton. The loss of mangrove wetlands erodes the base of the estuary ecosystem. These wetlands are essential to maintaining such environmental functions as nutrient cycling, filtra-

tion of pollutants, carbon storage, habitat utilization, floodwater storage, etc. As proposed, the project would completely eliminate all of these functions within the proposed impact area.

Mangrove wetlands are Essential Fisheries Habitat (EFH) for a variety of commercially important fish species. Mangroves provide forage, refuge, nursery and maturation requirements of a variety of aquatic species. Red mangroves form a network of prop roots that trap debris creating new land. Oysters attach to these roots where they are covered during high tide.

Raccoons can feed on these oysters at low tide. Fiddler crabs burrow in the mud beneath the roots. Birds that roost or nest in the mangroves, not only provide organic matter in the form of guano, but also feed on crabs living in the mangroves. Small baitfish feed on the algae attached to the roots of the mangrove. Larger game fish such as redfish, snook, and trout feed on the baitfish. Mangroves also serve as valuable nursery areas for shrimp, crustaceans, mollusks, and fish, providing a critical link in Florida's commercial and recreational fishing industries. Placement of fill for the driveway would also alter flow to the tidal lake on site. Tidal lakes are important because they provide food and shelter for a variety of immature aquatic species.

(5) Wetlands (33 CFR 320.4(b)): The proposed project would directly impact approximately 1.7 acres of mangrove wetlands. As outlined in the NOAA Fisheries letter, tidal mangrove wetlands serve various

important natural functions. Every effort should be made to protect this diminishing natural resource.

(6) Historic and cultural resources (33 CFR 320.4(e)): As the SHPO indicated in a letter dated 4 March 2003, it is unlikely that any historic or cultural resources are present due to the location and/or nature of the proposed project.

(7) Fish and wildlife values (33 CFR 320.4(c)): Mangrove wetlands are important for use as forage, refuge, and nursery for a variety of fish and shellfish. Mangrove wetlands also export detritus to the estuarine food web providing an important link in the food web. Over 70% of commercial fish species and sport fish species depend on mangroves for food and habitat. The value of mangrove wetlands to fish and wildlife values result in substantial adverse impacts on the public interest.

(8) Flood hazards: The amount of fill associated with the proposed project would have a negligible impact on flooding in the surrounding area.

(9) Floodplain values (33 CFR 320.4(l)): The project should have a minimal affect on floodplain values.

(10) Land use: The applicant currently owns the project site. The applicant has obtained approval from both state and authorities that regulate land uses.

(11) Navigation (33 CFR 320.4(o)): Completion of the project would have no impact on navigation.

(12) Shore erosion and accretion: Mangroves serve as storm buffers by functioning as windbreaks and

baffling wave action. Loss of mangroves would negatively impact shore protection for the applicant's project but should have no affect on shore erosion and accretion on other property; however, the cumulative affect of additional mangrove loss from other projects could impact shoreline protection.

(13) Recreation: The project site does not provide any existing recreational opportunities for the public other than fishing along the shoreline. The project would not provide any additional recreation opportunities for the public. The applicant's recreational opportunities would be enhanced.

(14) Water supply (33 CFR 320.4(m)): Not applicable.

(15) Water quality (also 33 CFR 320.4(d)): Mangrove wetlands improve water quality by stabilizing shorelines, trapping alluvial material, and removing pollutants from the water. The chemical and biological activity in mangroves causes them to act as sinks which concentrate pollutants. Some of these pollutants are nutrient salts, organic wastes (sewage), toxic minerals (heavy metals), organic chemicals (pesticides and herbicides), suspended or floating substances that suffocate and reduce light and species diversity in the underwater section of the mangrove.

(16) Energy Conservation and Development (33 CFR 320.4(n)): Not applicable.

(17) Safety: Not applicable.

(18) Food and fiber production: Not applicable.

(19) Mineral needs: Not applicable.

(20) Considerations of property ownership: The project site is owned by LTVC.

b. Public/private benefits of the proposed work: There would not be any public benefits as a result of the proposed project. The private benefits to the applicant would be an economic return on the sale of the parcel.

c. Practicability of alternative locations and methods to address unresolved conflicts: NOAA Fisheries has not removed their objection to the project because the project would require the construction of a residence in a mangrove forest.

d. Extent and permanence of effects of proposed work on public and private uses: The detrimental impacts would be the loss of valuable tidal mangrove wetlands through development in an area that is 90% tidal wetlands. The detrimental impacts would be to fish and wildlife resources, water quality, and shoreline stabilization. Detrimental impacts would be cumulative and set a precedent for development of other tidal wetland areas when viable alternatives exist. The central east Coast of Florida has one of the fastest growing populations in the United States. It is estimated that almost 80% of Florida's new residents settle on coastal regions. The Florida Department of Natural Resources has estimated that the Indian River Lagoon has lost approximately 80% of its mangrove/marshes and 30% of its seagrass beds. This loss is mainly a result of waterfront development.

The only permanent benefits that would accrue as a result of the proposed project would be to the applicant.

e. **Threatened or endangered species:** The FWS concurred by letter dated 18 March 2003 that the work proposed "may affect but is not likely to adversely affect" the wood stork and the eastern indigo snake.

f. **Corps' wetland policy:** The Corps' wetland policy states that the least environmentally damaging practicable alternative may be authorized if the impacts are not contrary to the public interest. Less environmentally damaging alternatives to the proposed project includes waterfront properties owned by the applicant, properties that could be purchased by the applicant, and less damaging on-site configurations. The Corps' has determined that less damaging practicable alternatives is presumed to exist; therefore, we believe the proposed project is not in accordance with the Corps' wetland policy.

g. **Cumulative and secondary impacts:** The cumulative impacts of development in tidal mangroves would result in shoreline stability issues, decreased water quality, decreased productivity in commercial and recreational fisheries, lower ecosystem diversity, and increased pollution from run-off from development. Similar impacts could be expected along the IRL should a precedent be set to allow development in areas that are tidal mangroves. As stated above in paragraph 10d, the IRL has lost a considerable amount of its historic mangrove and salt marsh areas as a result of cumulative and secondary impacts.

11. ESSENTIAL FISHERIES HABITAT (EFH): The proposed project would negatively impact EFH for a variety of species identified as being of national economic importance. In a letter dated 18 March 2003, NOAA Fisheries identified the project site wetlands as EFH for postlarval and juvenile red drum (*Scianenops ocellata*), white shrimp (*Litopenaeus setiferus*), pink shrimp (*Farfantepenaeus duorarum*), brown shrimp (*Farfantepenaeus azetecus*), and adult summer flounder (*Paralichthys dentatus*). NOAA Fisheries concluded that an important area of EFH and affiliated Federal managed species would be adversely affected by the proposed action. The EFH Conservation Recommendation was that the DA authorization not be granted.

NOAA Fisheries added that the area also provides nursery and forage habitat for other species including black drum (Pogonias cromis), Atlantic menhaden (Brevoorita tyrannus) and blue crab (Callinectes sapidus) that serve as prey for other species (e.g., mackerels, snappers, and groupers) that are managed by the South Atlantic Fisheries Management Council (SAFMC), and for highly migratory species (e.g., billfishes and sharks) that are managed by NOAA Fisheries. The NMFS sited publications, which discussed the value of mangroves including, "Mangrove forests" by R.G. Gilmore, Jr. and S.C. Snedaker. 1993, and "Utilization of the red mangrove prop root habitat by fishes in South Florida" by G.W. Thayer, D.R.Colby, and W.F. Hetter. 1987. Mar. Ecol. Prog. Ser. 35: 25-28.

12. PUBLIC HEARING EVALUATION: There were no public hearing requests.

13. CORPS' ANALYSIS OF COMMENTS AND RESPONSES: The Corps' is in agreement with the assessment NOAA Fisheries made in its letter to the Corps' regarding this project. The Corps' concurs that these wetlands function as described by NOAA Fisheries. The Corps' of Engineers believes these wetlands are EFH and provide a vital link in the life cycle of marine life of commercial, recreational, and ecological importance.

The Corps' does not agree with the conclusions made in the "Comprehensive Wetland Assessment of Wetlands at Stingaree Point," September 2002 (see 7d(b)) provided by the applicant on 30 June 2003. It is the Corps'' opinion that the data are not determinative of the quality of the subject wetland but should be considered along with other data.

The Corps' does not agree with the applicant's conclusion made in the 28 June 2004 letter, which responded to the Corps'' request for a supplement to the geographic alternatives analysis, that the subject parcel is the least environmentally damaging alternative and in addition believes that reasonable use of the property has been achieved.

14. DETERMINATIONS:

a. Finding of No Significant Impact (FONSI): Having reviewed the information provided by the applicant and all interested parties and an assessment of the

environmental impacts, I find that this permit action will not have a significant impact on the quality of the human environment. Therefore, an Environmental Impact Statement will not be required.

b. Compliance with 404(b)(1) Guidelines: Having completed the evaluation in paragraph 9 above, I have determined that the proposed discharge does not comply with the 404(b)(1) guidelines. Not only are there less damaging methods to minimize onsite impacts, but also since housing is a non-water dependent use it is presumed that there are alternative project sites available. As proposed, the project would cause or contribute to significant degradation of Aquatic Resources of National Importance.

c. Section 176(c) of the Clean Air Act General Conformity Rule Review: The proposed permit action has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed de minimis levels of direct or indirect emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps', continuing program responsibility and generally cannot be practicably controlled by the Corps'. For these reasons a conformity determination is not required for this permit action.

d. Public Hearing Request: Not applicable.

e. Public Interest Determination: I find that issuance of a Department of the Army permit is contrary to the public interest.

PREPARED BY:

/s/ IRENE F. SADOWSKI
IRENE F. SADOWSKI
Merritt Island Regulatory Office

Reviewed by:

/s/ OSVALDO COLLAZO
OSVALDO COLLAZO
Chief, North Permits Branch

Reviewed by:

/s/ JOHN R. HALL
JOHN R. HALL
Chief, Regulatory Division

Approved by:

/s/ ROBERT M. CARPENTER
ROBERT M. CARPENTER
Colonel, U.S. Army
District Engineer

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2014-5093

LOST TREE VILLAGE CORPORATION,
PLAINTIFF-APPELLEE

v.

UNITED STATES, DEFENDANT-APPELLANT

Oct. 30, 2015

ON PETITION FOR REHEARING EN BANC

Appeal from the United States Court of Federal Claims in No. 1:08-cv-00117-CFL, Judge Charles F. Lettow

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Before: PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Appellant United States filed a petition for en banc rehearing. The court invited a response which was filed by appellee Lost Tree Village Corporation. The

petition was referred to the panel that heard the appeal, and thereafter the petition and response were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing en banc is denied.

The mandate of the court will be issued on November 6, 2015.

FOR THE COURT

Oct. 30, 2015 /s/ DANIEL E. O'TOOLE
Date DANIEL E. O'TOOLE
Clerk of Court

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2012-5008

LOST TREE VILLAGE CORPORATION,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed: June 6, 2013]

ORDER

Appeal from the United States Court of Federal Claims in case no. 08-CV-117, Judge Charles F. Lettow

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A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDREATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 13, 2013.

FOR THE COURT

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: 06/06/2013

cc: Jerry Stouck
Matthew Littleton
M. DiCrescenzo, P. Beard, II, J. Echever

LOST TREE VILLAGE CORP V US, 2012-5008
(CFC - 08-CV-117)

APPENDIX I

UNITED STATES COURT OF FEDERAL CLAIMS

No. 08-117 L

LOST TREE VILLAGE CORPORATION

v.

THE UNITED STATES

Mar. 19, 2014

JUDGMENT

Pursuant to the court's Opinion and Order, filed March 14, 2014, directing the entry of judgment pursuant to Rule 54(b) of the Rules of the Court of Federal Claims, there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiff recover of and from the United States the sum of $4,217,887.93, together with interest on that amount at the ten year Treasury STRIPS rate from August 2004 to the date the judgment is actually paid.

Hazel C. Keahey
Clerk of Court

Mar. 19, 2014 By: /s/ DEBRA L. SAMLER
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX J

1. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

2. 33 U.S.C. 1344(a) provides:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

3. 40 C.F.R. 230.10 provides in pertinent part:

Restrictions on discharge.

* * * * *

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or sit-

ing within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

* * * * *

4. 40 C.F.R. 230.10 (2000) provides in pertinent part:

Restrictions on discharge.

* * * * *

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of al-

ternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

* * * * *

5. 33 C.F.R. 209.120 (1975) provides in pertinent part:

Permits for activities in Navigable Waters or Ocean Waters.

* * * * *

(g) *Policies on particular factors of consideration.* In applying the general policies cited above to the evaluation of a permit application, Corps of Engineers officials will also consider the following policies when they are applicable to the specific application:

* * * * *

(3) *Effect on wetlands.* (i) Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps, and similar areas in coastal and inland navigable waters. Many such areas serve important purposes relating to fish and wildlife, recreation, and other elements of the general public interest. As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

(ii) Wetlands considered to perform functions important to the public interest include:

(a) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(b) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(c) Wetlands continuous to areas listed in paragraph (g)(3)(ii) (*a*) and (*b*) of this section, the destruction or alteration of which would affect detrimentally the natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristic, current patterns, or other environmental characteristics of the above areas;

(d) Wetlands which are significant in shielding other areas from wave action, erosion, or storm dam-

age. Such wetlands often include barrier beaches, islands, reefs and bars;

(e) Wetlands which serve as valuable storage areas for storm and flood waters; and

(f) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected.

(iii) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas, in response to new applications, and in consultation with the appropriate Regional Director of the Bureau of Sport Fisheries and Wildlife, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(iv) Unless the public interest requires otherwise, no permit shall be granted for work in wetlands identified as important by subparagraph (ii), above, unless the District Engineer concludes, on the basis of the

analysis required in paragraph (f) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits.

(a) In evaluating whether a particular alteration is necessary, the District Engineer shall primarily consider whether the proposed activity is dependent upon the wetland resources and environment and whether feasible alternative sites are available.

(b) The applicant must provide sufficient data on the basis of which the availability of feasible alternative sites can be evaluated.

(v) In accordance with the policy expressed in paragraph (f)(3) of this section, and with the Congressional policy expressed in the Estuary Protection Act, PL 90-454, state regulatory laws or programs for classification and protection of wetlands will be given great weight. (See also paragraph (g)(18) of this section).

* * * * *

6. St. Johns River Water Management District, Environmental Resource Permits: Surface Water Management Systems, Sec. 40C-4.091(1)(a) (rev. Sept. 2002) provides:

Publications Incorporated by Reference.

(1) The Governing Board hereby adopts by reference:

(a) Part I "Policy and Procedures," Part II "Criteria for Evaluation," subsections 18.0, 18.1, 18.2, and 18.3 of Part III and Appendix K "Legal Description Upper St. Johns River Hydrologic Basin," "Legal Description Ocklawaha River Hydrologic Basin," "Legal Description of the Wekiva River Hydrologic Basin," "Legal Description of the Econlockhatchee River Hydrologic Basin," "Legal Description of the Sensitive Karst Areas Basin, Alachua County," "Legal Description Tomoka River Hydrologic Basin," "Legal Description Spruce Creek Hydrologic Basin," "Legal Description of the Sensitive Karst Areas Basin, Marion County," and "Legal Descriptions of the Lake Apopka Drainage Basin," and Appendix M "Regional Watersheds for Mitigation Banking," of the document entitled "Applicant's Handbook: Management and Storage of Surface Waters," effective 9-26-02.

7. St. Johns River Water Management District, Applicant's Handbook: Management and Storage of Surface Waters, Sec. 12.2.1 (2002) provides in pertinent part:

Elimination or Reduction of Impacts

* * * * *

12.2.1.1 Except as provided in subsection 12.2.1.2, if the proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of subsections 12.2.2 through 12.2.3.7, then the District in determining whether to grant or deny a permit shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts.

The term "modification" shall not be construed as including the alternative of not implementing the system in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety through the endangerment of lives or property is not considered "practicable." A proposed modification need not remove all economic value of the property in order to be considered not "practicable." Conversely, a modification need not provide

the highest and best use of the property to be "practicable." In determining whether a proposed modification is practicable, consideration shall also be given to the cost of the modification compared to the environmental benefit it achieves.

12.2.1.2 The District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:

* * * * *

(b) the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.