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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 23-11119

FANE LOZMAN,

Plaintiff-Appellant,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Defendant-Appellee.

Filed: 10/16/2024

OPINION

William Pryor, Chief Judge:

This appeal requires us to decide whether a property owner's complaint that a city's comprehensive plan and ordinance caused a taking of his property is ripe for judicial review. Fane Lozman owns a parcel of submerged land and upland in the City of Riviera Beach, Florida. After the city enacted a comprehensive plan and ordinance that restricted development, Lozman sued Riviera Beach on the ground that the city deprived his parcel of all beneficial economic use or value without just compensation. *See* 42 U.S.C. § 1983. The district court granted summary judgment for Riviera Beach. Yet Lozman has not applied for a permit, variance, or rezoning from Riviera Beach to understand the "nature and extent" of permitted

development on his land. Because Lozman has not received a final, written denial of an application for the development of his land from Riviera Beach, his claim is not ripe for judicial review. So we vacate and remand with instructions to dismiss his complaint without prejudice for lack of subject-matter jurisdiction.

I. BACKGROUND

In 2014, Fane Lozman purchased property in the City of Riviera Beach, Florida. A title defect prevents Lozman from establishing the dimensions of his property. But the district court approximated that he owns 7.75 acres total—7.55 acres of submerged land within the Lake Worth Lagoon and 0.20 acres of upland. Only a sliver of Lozman's property is above water.

More than 20 years before Lozman purchased his parcel, the City of Riviera Beach adopted a comprehensive plan governing development in the city. The 1991 comprehensive plan created a "Special Preservation Future Land Use" designation which "preclude[d] any development of [s]ubmerged [l]ands... to the maximum extent permissible by law." But the comprehensive plan was amended in 2010 to permit the development of "[p]rivate residential fishing or viewing platforms and docks for non-motorized boats." The sole exception to the plan's development restrictions is the "savings clause," which provides that the plan "shall not be construed nor implemented to impair or preclude judicially determined vested rights to develop or alter submerged lands." In 2021, the plan was amended to create a density restriction for savings clause properties, only allowing "a density of one unit per 20 acres" for those properties that meet the exception.

Lozman's property has retained the "Special Preservation Future Land Use" designation under the comprehensive plan since 1991. But when Lozman purchased his parcel in 2014, the property bore an inconsistent zoning designation that allowed the development of single-family homes. This discrepancy persisted until July 8, 2020, when Riviera Beach adopted Ordinance 4147 to create a matching special preservation zoning district. The ordinance's restrictions on development mirror the comprehensive plan's limitations for special preservation zones. The ordinance allows the development of residential fishing and viewing platforms and docks. And the only exception is for those properties with "judicially determined vested rights to develop or alter submerged lands." But because the ordinance predated the 2021 plan amendment, the ordinance's "savings clause" does not include the density restriction.

Lozman says that when he purchased the parcel, he "expected that it could be developed for use as single-family residential lots." Lozman purchased the property in 2014 for $24,000. But he produced an appraisal valuing the property at $49,833,500 as of October 7, 2020. This valuation depends on Lozman maximizing the property's "highest and best use"—bulkheading and filling the submerged water to create "up to eight one-acre parcels." The appraisal was also "based on the hypothetical condition that permits could be granted for bulkhead and fill."

But Lozman has not yet acquired—or applied for—federal or state permits to develop his property. Indeed, Lozman has endured federal and state enforcement actions for the unauthorized development of his parcel. When Lozman secured a floating

home on his property with concrete blocks, both the United States Army Corps of Engineers and the Florida Department of Environmental Protection instituted enforcement actions against him for unauthorized modification of the Lagoon.

Lozman does not contest that a federal navigational servitude prohibits the development of his submerged property without a permit from the Corps. The Rivers and Harbors Appropriation Act of 1899 prohibits the excavation, filling, or modification of the channel of any "navigable water" of the United States without the permission of the Corps. *See* 33 U.S.C. § 403. Because the Lake Worth Lagoon is a "navigable water," Lozman's submerged parcel is subject to the Rivers and Harbors Act.

The United States pursued an enforcement action against Lozman in June 2021 for building structures in the Lagoon without authorization in violation of the Rivers and Harbors Act. The district court stayed that proceeding while Lozman sought a permit from the Corps. But Lozman did not provide the information requested by the agency's order, so the Corps never issued a permit. The district court granted the Corps's motion for summary judgment, and the resolution of that enforcement action is pending appeal.

The Florida Department of Environmental Protection instituted a similar action against Lozman in December 2020, alleging that the concrete blocks constituted an unauthorized filling of surface waters within the Lagoon. A Florida state court ordered the removal of the structures, and they were removed less than a month later. In June 2022, the state court entered a consent judgment ordering Lozman not to fill or deposit any material on the property until he obtained a permit or exemption from the Department.

But Lozman has not yet obtained such a permit or exemption from the Department.

Nor has Lozman applied for any other federal or state permit to develop his land. Lozman says that he intends to put his "replacement floating home" on a "dock on [his] property." But he has never applied for a permit for a dock—a permitted use under Ordinance 4147—from the Corps or the Department of Environmental Protection. Nor has Lozman proposed any plans to develop his property to Riviera Beach.

Lozman argues that "the denial of such permits is not the only way that a land-use plan can be 'applied' to a particular landowner." Instead, Lozman asserts that "Riviera Beach will not allow him to live on his property, provide electrical service to it, [or] permit the construction of a fence around it." Riviera Beach revoked Lozman's temporary electricity permit "due to [his] failure to identify any proposed use for the property." It also denied Lozman's application for a fence "due to a refusal by [Lozman] to provide [required] application material." Lozman has not established any causal connection between Ordinance 4147 and the denial of his permits other than their sequential timing.

Lozman brought this lawsuit alleging that the comprehensive plan and ordinance deprived him of all economically beneficial or productive use of his parcel. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The district court granted summary judgment for Riviera Beach because Lozman did not have any right to fill his submerged land under federal and state law; he was not denied all economically productive or beneficial uses of his land; and he did not plead a ripe *Penn Central* regulatory taking claim.

II. STANDARD OF REVIEW

"We review *de novo* questions concerning our subject matter jurisdiction, including standing and ripeness." *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006) (emphasis added).

III. DISCUSSION

The foundation for the exercise of federal courts' jurisdiction is Article III of the Constitution, which provides that the judicial power "shall extend" to certain "Cases" and "Controversies." U.S. CONST. art. III, § 2. As a result, "'[f]ederal courts are courts of limited jurisdiction'" and "'possess only that power authorized by the Constitution and statute.'" *United States v. Rivera,* 613 F.3d 1046, 1049 (11th Cir. 2010) (alteration adopted) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)). Article III "restricts the ability of courts to review cases and controversies that are not ripe." *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty.*, 842 F.3d 1324, 1329 (11th Cir. 2016).

"The ripeness doctrine keeps federal courts from deciding cases prematurely and protects them from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Rivera*, 613 F.3d at 1050 (alteration adopted) (citations and internal quotation marks omitted). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id*. (citation and internal quotation marks omitted). "Even when a ripeness question in a particular case is prudential, [a court] may raise it on [its] own motion, and cannot be bound by the wishes of the parties." *Reno v. Cath. Soc. Servs.,*

Inc., 509 U.S. 43, 57 n.18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (citation and internal quotation marks omitted).

The Supreme Court has held that a takings claim challenging the application of a land-use regulation is not ripe for judicial review "until the government entity charged with implementing the regulation[ ] has reached a final decision regarding the application of the regulation[ ] to the property at issue." *See Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 588 U.S. 180, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019); *accord S. Grande View Dev. Co. v. City of Alabaster*, 1 F.4th 1299, 1305–06 (11th Cir. 2021). "[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). Because precedents "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it," a claim under *Lucas* requires a final decision on the "extent of permitted development" on the land in question. 505 U.S. at 1011, 112 S.Ct. 2886 (citation and internal quotation marks omitted).

Neither the comprehensive plan nor the ordinance here constitutes a "final decision" sufficient to satisfy the ripeness requirement. Until a local government decides how it intends to apply a broad, locality-wide "regulation to a specific piece of property owned by the [owner]," there is not a "final decision." *See S. Grande*

View, 1 F.4th at 1307 (discussing *Williamson Cnty*., 473 U.S. 172, 105 S.Ct. 3108, and *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990)). Because Lozman has not applied for a permit, variance, or rezoning from either the comprehensive plan or ordinance, he has not received a final decision from Riviera Beach on how either regulation would apply to the development of his parcel.

We have consistently held that a comprehensive plan is not a "final decision" sufficient to satisfy the ripeness requirement. When a landowner challenged a comprehensive plan without requesting a rezoning, in *Eide v. Sarasota County*, we held that, before "challeng[ing] the County's *application* of the sector plan to his property, [the landowner] must first demonstrate that the sector plan has been *applied* to his property." 908 F.2d at 724. We reached a similar conclusion in *Reahard v. Lee County*, when we held that the landowners' takings claim "could not have ripened, if ever, until" the landowners received a final decision from the board of commissioners on their variance application. 30 F.3d 1412, 1415–16 (11th Cir. 1994).

The same reasoning applies here. The comprehensive plan alone cannot constitute a final decision on Lozman's property. That the comprehensive plan includes a material exception permitting development underscores that the plan alone is not a final decision precluding the development of Lozman's property. Because he has not applied for a permit, variance, or rezoning from Riviera Beach on the application of the comprehensive plan to his property, Lozman has not yet received a final decision on the comprehensive plan's application to his property.

An ordinance is rarely a "final decision." Ordinarily "no 'final decision' [exists] until an aggrieved landowner has applied for at least one variance to a contested zoning ordinance." *Reahard*, 30 F.3d at 1415 (citing *Williamson Cnty*., 473 U.S. at 186, 105 S.Ct. 3108). But we have sometimes considered a "targeted" zoning ordinance a final decision. *S. Grande View*, 1 F.4th at 1306–08. When a city enacted a specific ordinance that "targeted *precisely* and *only*" the developer's property, we held in *South Grande View* that the developer's claim was ripe despite his failure to apply for a variance. *Id.* (emphasis added). Because "there was no ambiguity as to how a general plan would be applied to a specific project—the zoning ordinance itself was the [c]ity's final decision on the matter." *Id.* at 1307.

Unlike in *South Grande View,* the ordinance here was not a "targeted" ordinance that "*precisely* and *only*" targeted Lozman's property. *Id.* (emphasis added). Riviera Beach adopted the ordinance to cure the inconsistent land designation between the comprehensive plan and zoning ordinance. The ordinance applied to properties across Riviera Beach. And the application of the ordinance—and its exception—to Lozman's property remains unknown because he has not sought a permit to develop his land. Because Riviera Beach's ordinance was a "general plan ... that only coincidentally ended up affecting a discrete portion" of Lozman's property, the ordinance was not a final decision on his parcel. *Id.* at 1306–07.

Nor would it have been futile for Lozman to seek a final decision from Riviera Beach. Although we have sometimes exempted landowners from seeking a final decision where "it would [have] be[en] futile for the plaintiff to pursue a final decision," *id.* at 1308 n.12

(citation and internal quotation marks omitted), the futility exception does not excuse Lozman's failure to apply for a final decision from Riviera Beach. The futility exception may excuse the "repeated submission of development plans where the submission would be futile." *Eide*, 908 F.2d at 726–27. For example, when a developer failed to reapply to the same commission that had previously denied his development permit, we held that the developer's appeal would have been futile. *See Resol. Tr. Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1547 (11th Cir. 1994). Because "no uncertainty exist[ed] regarding the level of development the [commission] would permit," we decided that "the reapplication [process] would not have served its intended purpose." *Id.*; *see also Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1515–16 (11th Cir. 1987) (holding that an application for an additional variance would have been futile, since the developer's site plans were revoked and building permit rejected after the city passed ordinances barring development).

Unlike in *Resolution Trust Corp.,* applying for a variance, rezoning, or permit for development would not have required Lozman to reapply to the same council that had previously denied his application. Riviera Beach has not received any application from Lozman to develop his land. Nor has it preemptively denied one. The electrical permit was revoked *because* Lozman failed to provide any proposed use for the property. In other words, Lozman's failure to submit development plans resulted in the denial of his permit for electricity. Lozman's application for development would not have been a "futile" repeated application.

We have also held that the futility exception may exempt a plaintiff from applying for a variance when no viable variance is available. For example, in *South*

Grande View, Alabama law permitted only variances that ensured that "the spirit of the ordinance shall be observed." 1 F.4th at 1308 n.12 (citation and internal quotation marks omitted). Because the ordinance in *South Grande View* prohibited development on "*precisely* and *only*" the developer's property, *id*. at 1307 (emphasis added), no variance permitting development could fall within "the spirit of the ordinance," *id.* at 1308 n.12 (internal quotation marks omitted).

This appeal is distinguishable. Riviera Beach's development code empowers a special magistrate to grant applications for variances so long as the ordinance does not prohibit the use. Riviera Beach, Fla., Code § 31-42(d) (2014). And the ordinance here contains an exception permitting development. It would not have been futile for Lozman to pursue this exception to understand the nature and extent of permitted development for his *Lucas* claim.

The permitted uses and exception in Ordinance 4147 amply support the necessity of a final decision from Riviera Beach before a court determines whether Lozman was denied "all economically beneficial or productive use of [his] land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. The ordinance allows two forms of development for which Lozman could have applied to understand the "nature and extent of [his] permitted development." *Id*. at 1011, 112 S.Ct. 2886. The regulations permit "[p]rivate residential fishing or viewing platforms and docks for non-motorized boats." And the ordinance's "savings clause" exempts "judicially determined vested rights" from the limitations of the regulations.

We have not held that a property owner who has not applied for *any* permit, variance, or rezoning to

develop his land may utilize the futility exception. And we will not do so here. Because Lozman has failed to apply for a permit to develop his land, we cannot know the extent of the economic damage, if any, caused by Riviera Beach's comprehensive plan or ordinance.

Lozman asks us to resolve his dispute prematurely. The extent of permitted development is unknown. Lozman never applied for a permit for development from Riviera Beach. Because Lozman has never received a final, written denial of his application for the development of his land from Riviera Beach, his claim is not ripe for judicial review.

IV. CONCLUSION

We VACATE the judgment and REMAND with instructions to DISMISS Lozman's complaint without prejudice for lack of subject-matter jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 22-80118-CV-MIDDLEBROOKS

FANE LOZMAN,

Plaintiff,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Defendant.

Signed April 3, 2023

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Donald M. Middlebrooks, United States District Judge

THIS CAUSE comes before the Court upon Plaintiff's Motion for Partial Summary Judgment (DE 137) filed December 21, 2022, and Defendant's Motion for Summary Judgment (DE 135) filed December 19, 2022. Plaintiff Fane Lozman and Defendant City of Riviera Beach, a municipality in Palm Beach County (Complaint at ¶5), have had a tempestuous relationship and legal history, which has led to two decisions in Plaintiff's favor in the Supreme Court. *See Lozman v. City of Riviera Beach*, 568 U.S. 115(2013) ("Lozman

SC I"); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018) ("Lozman SC II").

One case involved the seizure and destruction of Mr. Lozman's floating home. The other involved an arrest of Mr. Lozman while he was speaking at a City Council meeting. This case is another chapter in this dispute. It presents issues involving the just compensation clause of the Fifth Amendment and federal and state law concerning submerged lands beneath navigable and tidal waters.

Plaintiff brings his Complaint filed on January 24, 2022 (DE 1) ("Complaint") pursuant to 42 U.S.C. § 1983, arguing that the City has taken his private property (the "Property") without just compensation. (Complaint at 7). Plaintiff filed for Partial Summary Judgment on the question of liability (DE 137) and Defendant has also moved for Summary Judgment (DE 135). Both the motions are fully briefed (DE 137, 158, 168, 135, 143, and 151) and oral argument took place on February 9, 2023. (DE 192). For the reasons that follow, Plaintiff's Motion is denied and Defendant's Motion is granted.

I. BACKGROUND

A. Mr. Lozman's Property

Mr. Lozman owns real property located at 5101 N. Ocean Avenue, Riviera Beach, Florida. Almost all of his property is submerged land within the Lake Worth Lagoon. The Lagoon is Palm Beach County's largest estuary, spanning approximately twenty-one miles from North Palm Beach to Ocean Ridge. Lake Worth Lagoon is up to a mile wide and connected to the Atlantic Ocean via two inlets. The Atlantic Intracoastal Waterway cuts through the estuary as it traverses the East Coast of the United States. Lake

Worth Lagoon is subject to the ebb and flow of the tide and is also used to transport interstate commerce.

Only a sliver of Mr. Lozman's land is above water. The dry land is approximately 20 feet wide, along N. Ocean Drive, its eastern boundary. The dry portion of his land has vegetation sea grapes and mangroves. From north to south the property is approximately 300 feet. (Appendix A; *see also* DE 134-20). While the western boundary line is disputed, this portion is approximately 7.75 acres. Only approximately .2 acres is dry land.

Mr. Lozman acquired the property from Ms. Omah Kiser in 2014. Mr. Lozman testified that Ms. Kiser got in touch with him after hearing about the destruction of his floating home. According to Mr. Lozman, she had obtained the property from her father and "she thought it would be a good property where I could put a floating home on and the City could never take it and destroy it again..." (DE 134-3 at 13). Ms. Kiser told Mr. Lozman she wanted to give him the property because she did not plan to develop it. (DE 138-1 at 5). But Mr. Lozman purchased the property for $24,000.00. *Id.*

In the early summer of 2016, Mr. Lozman brought a floating home to the property and lived there for a time. (DE 134-3 at 21). But the home was vandalized and then sunk. (*Id.* at 21-23).

Subsequently, in 2019 or 2020, Mr. Lozman placed a more substantial floating home on the property. (*Id.* at 27). That home was secured by concrete blocks. *Id.* at 25-26. On December 1, 2020, the State of Florida Department of Environmental Protection issued a Notice of Violation, Orders for Corrective Action and Administrative Penalty with findings of fact and conclusions of law that determined that the concrete

blocks constituted unauthorized filling of surface waters on the property within the Lagoon. (DE 134-26) (*State of Florida Department of Environmental Protection v. Lozman*, No. 2021-CA-004564, DE 40 at 1–2 (Fla. 15th Cir. Ct., Aug. 2021)) ("FDEP v. Lozman Final Consent Judgment"). On August 16, 2021, the Florida State Court ordered removal of the structures. *Id.* at 2. On or about September 7, 2021, the structures were removed. *Id.*

On June 30, 2022, a consent judgment was entered ordering that Mr. Lozman not fill or deposit any material within the property until: "i. A final judgment ... or subsequent action for declaratory relief is issued" in Mr. Lozman's favor authorizing fill on the property or; ii. "A valid final permit is issued by the Department authorizing fill on the Property or, iii. A written order verifying an exemption is issued by the Department" (*See* DE 134-26 at 3).

Around the same time, on June 25, 2021, at the request of the Secretary of the Army acting through the United States Army Corps of Engineers, the United States sued Mr. Lozman. *See United States v. Lozman*, No. 21-cv-81119 (S.D.F.L.) ("*U.S. v. Lozman* 21-81119"). The complaint alleges that Mr. Lozman is building structures in waters of the United States without authorization, in violation of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 406, 413, and that Mr. Lozman is creating an obstruction to navigable waters, in violation of 33 U.S.C. § 403. (*Id.* at DE 1). That case has been stayed while Mr. Lozman seeks a permit from the U.S. Army Corps of Engineers. (*Id.* at DE 55).

On March 29, 2021, Mr. Lozman sued the State of Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement

Trust Fund ("TIITF") of the State of Florida alleging that as a successor to a TIITF deed, he had a right to bulkhead and fill without need of a permit from FDEP. (DE 134-22). The defendants moved to dismiss and on December 9, 2021, the state trial judge granted that motion. (DE 134-24). The dismissal order advised Mr. Lozman that "he could elect to pursue administrative remedies through the DEP, appeal, or seek leave to amend." *Id.* He pursued none of these alternatives. Instead, on April 4, 2022, Mr. Lozman filed a stipulation of dismissal. (DE 134-25 at 3).

Rather than continuing to pursue his remedies in state court, Mr. Lozman filed this action. He alleges that the City of Riviera Beach has taken his property and he should recover damages including "the fair market value for the land based on the highest and best use supported by reasonable expectations on the date of the taking..." (DE 1).

Mr. Lozman has produced an appraisal which states that "the highest and best use would be to bulkhead and fill to create a site with up to eight one-acre parcels." (DE 134-17 at 28). Mr. Lozman's report values the property as of October 7, 2020 to be $49,833,500. (DE 134-17 at 46).

B. The Comprehensive Plan and Regulatory Framework

In Florida, "each county and municipality is required to prepare a comprehensive plan for approval by the Department of Community Affairs." *Bd. of County Comm Rs v. Snyder,* 627 So. 2d 469, 473 (Fla. 1993). The adopted local plan must include "'principles, guidelines and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development' of the local

government's jurisdictional area." *Id.* (citing to § 163.3177(1) Fla. Stat. (1991)).

The Comprehensive Plan is both paramount and nondiscretionary. *See* § 163.3194(1)(a), Fla. Stat. (2022) ("After a comprehensive plan ... has been adopted in conformity with this act, *all development* undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element *shall be consistent with such plan* or element as adopted.") (emphasis added).

"The statute is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State." *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 198 (4th DCA 2001). The statute does not say that local governments retain any degree of discretion as to whether a proposed development should be consistent with a Comprehensive Plan. *Id.*

"[C]itizen enforcement is a primary tool for insuring consistency of development decisions with the Comprehensive Plan," and Florida courts do not accord deference to the local government's interpretation. *Id.* at 202. For example, in *Pinecrest Lakes*, upon a finding of development inconsistent with a Comprehensive Plan, a trial judge ordered the demolition of apartment buildings at a loss of $3.3 million dollars, and the appellate court affirmed. *Id.*

Riviera Beach has adopted a Comprehensive Plan ("the Plan"). (DE 134-7). The history of the Plan's adoption is described in *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174 (Fla. 4th DCA 1995).

The State of Florida's Department of Community Affairs ("DCA") has the duty to determine whether

Comprehensive Plans are "in compliance." *Florida League of Cities, Inc. v. Admin. Com'n*, 586 So. 2d 397, 400 (Fla. 1st DCA 1991). A "not in compliance" finding could jeopardize state funding for the City. *Id.* DCA determined that the City's initial Plan was "not in compliance," in part because it allowed residential development of the submerged land along the east side of the Lake Worth Lagoon. (DE 134-8); *Shillingburg*, 659 So 2d at 1177. DCA required the City "to revise the plan 'to establish a lower density for areas designated as preservation....'" *Id.*

The City and the DCA entered a stipulated settlement agreement which, in part, created the Special Preservation ("SP") Future Land Use ("FLU") designation for the area:

> Special Preservation –mangroves, wetlands, and special estuarine bottom lands. These mangroves and special estuarine bottom lands are protected by federal, State and local agencies involved in the wetlands preservation, dredge and fill permitting, and other hydrological modifications. It is the expressed policy objective of the City to preclude any development of submerged lands, including but not limited to mangroves, wetlands, and estuarine bottom lands, to the maximum extent permissible by law. It is further the policy of the City to oppose any applications for dredge or fill permits pending before applicable State or Federal agencies. This policy objective shall not be construed, nor implemented to impair or preclude judicially determined vested rights to develop or alter submerged lands.

(DE 134-8 at 21). The SP FLU was approved by DCA and became effective on December 19, 1991. *Shillingburg*, 659 So. 2d at 1177.

Litigation regarding the SP FLU designation ensued, during which the City amended the Plan to allow "private residential fishing or viewing platforms and docks for nonmotorized boats." *Id.* at 1178. Nevertheless, the plaintiffs/landowners claimed facial and as-applied takings. *Id.* The Fourth District Court of Appeal held that the SP FLU provision did not constitute a facial taking, because it allowed a dock and left open the possibility of other uses. *Id.* at 1179. The Court held the as-applied challenges were not ripe. *Id.* at 1180.

In August 1993, the City submitted proposed Plan Amendment 93-11 to the DCA for review and comments. *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 260–61 (Fla. 4th DCA 2001). This amendment proposed low-density residential development in the SP FLU. *Id.* DCA objected, and the City abandoned this amendment. *Id.* On May 17, 1995, the City asked DCA whether it would allow any development on the submerged lands and, if so, of what type and density. *Id.*; (DE 134-10 (May 17, 1995 D. Kant Letter) at 2). On August 10, 1995, DCA responded that "in the absence of a judicial determination of a vested right to develop, no development of submerged lands should be allowed." *Taylor*, 801 So. 2d at 260–61; (DE 134-11).

The Plan was amended on October 6, 2010, preserving the SP FLU language required by DCA and providing that

> private residential fishing or viewing platforms and docks for non-motorized boats may

> be permitted subject to the following regulations:
>
> 1. Platforms and docks shall not extend outward past the mean low water line.
>
> 2. Construction must be fully achievable from an on-shore location.
>
> 3. Permits must be obtained from DEP and/or all other applicable regulatory agencies.

(DE 134-12). The 2010 Plan further provides, "[t]he policy objective shall not be construed nor implemented to impair or preclude judicially determined vested rights to develop or alter submerged lands," consistent with the DCA's 1995 correspondence. *Id.*

On December 1, 2021, the City updated the Plan to include the following language as part of the SP FLU: "For properties found to have judicially determined vested rights to develop or alter submerged lands, a density of one unit per 20 acres will be assigned to said property." (DE 134-13). Thus, properties with a vested right to fill submerged lands may develop at one residential unit per 20 acres without a plan amendment.

Mr. Lozman's property has been assigned an SP FLU since 1991. (DE 134-14 at ¶4) ("Sirmons Affidavit"). However, at the time of purchase, the property bore an inconsistent residential zoning designation, RS-5. (Complaint at ¶12).

On July 8, 2020, the City adopted Ordinance 4147 to create a SP zoning district matching the existing SP FLU designation for properties assigned to the SP FLU. (DE 134-15 at 5) ("Ordinance 4147"). The SP zoning district is virtually identical to the SP FLU

policy, including the same "savings clause." *Id.* at 2–3, § 2. Ordinance 4147 allows the same "private residential fishing or viewing platforms and docks for non-motorized boats" as well as mitigation banks and preservation land. *Id.*

On October 20, 2021, Riviera Beach adopted Ordinance No. 4178 pertaining to "boats, vessels, floating structures, live-aboard vessels" and other watercraft. (DE 144-8).[1] The Ordinance is expressly responsive to the Supreme Court's holding in Lozman SC I and prohibits floating structures and live-aboard vessels within the City with certain exceptions. Pertinent here, Ordinance 4178 does not apply to floating structures and/or live-aboard vessels lawfully moored in a permitted private mooring field, provided the structure or vessel is not moored in less than four feet of water measured at mean-low tide. Moreover, Ordinance 4178 is not applicable to a floating structure that federal, state and local laws and regulations expressly permit and has received all required permits or to any vessel, including a live-aboard vessel located upon the Florida Intracoastal Waterway.

II. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Whether a taking compensable under the Fifth Amendment has occurred is a question of law based on

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[1] Mr. Lozman does not allege that Ordinance No. 4178 constituted a taking of his property. However, in his response to the City's summary judgment motion, he suggests that the houseboat ordinance was also a taking. (DE 143 at 2).

factual underpinnings." *Bass Enterprises Prod. Co. v. United State*s, 133 F.3d 893, 895 (Fed. Cir. 1998) (citing *Penn Central* and *Lucas*). In my view, the conclusions I have reached in this Order turn on legal questions, based upon facts that are not in dispute.

III. ANALYSIS

To advance his claim, Mr. Lozman relies upon two cases, the Supreme Court's decision in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) and the Eleventh Circuit's recent decision in *South Grande View Development Co. v. City of Alabaster*, 1 F. 4th 1299 (11th Cir. 2021). The facts of those cases, however, are strikingly different than those presented by Mr. Lozman. Neither is helpful, and their analyses show the deficiencies of Mr. Lozman's claim.

First *Lucas*: Mr. Lucas bought two residential lots, approximately 300 feet from the beach on the Isle of Palms in South Carolina for $975,000. *Lucas* at 1006. At the time he acquired the parcel there was no obligation to obtain any permits and his intention was to do what the owners of the immediately adjacent parcels had already done; erect single family residences. *Id.* at 1008. He commissioned architectural drawings. *Id.*

Two years later the South Carolina legislature enacted the Beachfront Management Act. *Id.* The Act decreed a permanent ban on construction as far as Mr. Lucas' lot were concerned and the lower courts found that this prohibition deprived him of any reasonable economic use of the lots. *Id.* at 1009.

The Supreme Court held "that 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, he has suffered a taking." *Id.* at 1019.

However, the court emphasized "that the Takings Clause does not require compensation when an owner is barred from putting land to a use" proscribed by existing rules or understandings. *Id.* at 1030. *Lucas* requires a "logically antecedent inquiry" into the background principles of property law as that determines the nature of the private property allegedly taken.[2] *Id.* at 1027. And, particularly given the facts in this case, it is useful to look at the examples the Court gave. *Compare Scranton v. Wheeler*, 179 U.S. 141 (1900) (interests of "riparian owner in the submerged lands ... bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444 U.S. at 178–180 ("imposition of navigational servitude" on marina created and rendered navigable at private expense held to constitute a taking). "On this analysis, the owner of a lakebed ... would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land." *Lucas* at 1029.

Interests in property are not created by the Constitution. *Webbs Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 161 (1980). Rather they are created and defined "by existing rules or understandings that stem from an independent source such as state law." *Id.* at

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[2] *Lucas*, 505 U.S. at 1003, 1027 ("Where the State seeks to sustain regulation which deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the prescribed use interest were not part of his title to begin with.")

451. Over thirty years before Mr. Lozman acquired his property, the Florida Supreme Court, in analysis that anticipated the Supreme Court's *Lucas* decision, held that a limitation on filling submerged lands did not constitute a taking. *See Graham v. Estuary Props Inc*., 399 So. 2d 1374 (Fla. 1981) *cert. denied* 454 U.S. 1083 (1981). There, the plaintiff owned almost 6,500 acres in Southwest Florida, much of it wetlands and submerged lands. *Id.* at 1376. Only about 526 acres were "dry enough to be classified as non-wetlands." *Id.* The plaintiff sought to dredge and fill a substantial portion of the wetlands. *Id.* The Board of County Commissioners and the Florida Land and Water Commission denied the application, but the First District Court of Appeals held that the denial constituted a public taking of private property for public use without compensation in violation of both the United States and Florida Constitutions. *Id.*

The Florida Supreme Court reversed and in doing so, made three points pertinent here. First, the Court distinguished cases where the landowners had purchased submerged lands directly from the state with express authorization to fill the land.

> The property owned by Estuary, on the other hand is not entirely submerged although part of it is covered part of the time by tidal flows. Furthermore, Estuary did not purchase the property from the state. Estuary purchased the property in question from a private individual with full knowledge that part of it was totally unsuitable for development.

Id. at 1381. The Florida Court quoted with approval language of the Wisconsin Supreme Court: "an owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use

it for a purpose for which it is unsuited in its natural state and which injures the rights of others." *Just v. Marinette County*, 56 Wis 2d. 7, 17, 201 N.W. 2d 761, 768 (Wis. 1972); *see also*, *Namon v. State Dept of Environmental Regulation*, 558 So. 2d 504 (Fla. 3d DCA 1990) (citing *Graham v. Estuary Properties, Inc*., *supra*, and finding no taking where 6-acre tract could not be developed without filling wetlands. "Appellants are deemed to purchase the property with constructive knowledge of applicable land use regulations.").[3]

A. Background Principles

Most of Mr. Lozman's property is and always has been submerged land in an environmentally sensitive protected lagoon. His property interests have always been limited by background principles of both federal and state law. He could have no reasonable expectation to be able to change the essential natural character of his property.

1. Navigation Servitude

The United States contends that the Lake Worth Lagoon beneath which Mr. Lozman's submerged lands exist are navigable waters of the United States within the meaning of section 10 of the Rivers and Harbors Act, 33 U.S.C § 403 which provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the

[3] *See also*, Murr v. Wisconsin, 137 S. Ct. 1933, 1945–46 (2017) ("courts must look to the physical characteristics of the landowners' property. These include the physical relationship of any of the distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular it may be relevant that the property is located in an area that is subject to, or likely to become subject to environmental or other regulation.")

> navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, or capacity of, any port, road stead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

"Navigable waters of the United States" include "those waters that are *subject to the ebb and flow of the tide*." 33 C.F.R. 5329.4; *United States v. Harrell*, 926 F. 2d 1036, 1039 (11th Cir. 1991) (emphasis added). As noted above, the United States has initiated enforcement proceedings against Mr. Lozman as a result of the presence of his floating home. *U.S. v. Lozman* 21-81119. That case has been stayed while Mr. Lozman seeks a permit.

Navigable waters are subject to national planning and control; "there is no private property in the flow of the stream." *United States v. Appalachian Power Co*., 311 U.S. 377, 423 (1940). Moreover,

> [w]hatever the [n]ature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Scranton v. Wheeler, 179 U.S. 141, 163 (1900); *see also, Kaiser Aetna v. United State*s, 444 U.S. 164 (citing to *United States v. Chandler-Dunbar Water Power Co*., 229 U.S. 53 (1913)).

Similarly, the State of Florida Department of Environmental Protection has instituted enforcement proceedings against Mr. Lozman and found that concrete blocks placed in the lagoon to moor the floating home constituted unauthorized filling of surface waters. (DE 134-26). Subsequently, the Department filed a petition in state court to enforce the provisions of its final order. The Department alleged that by filling the Lake Worth Lagoon with structures, Mr. Lozman violated Section 373, 129(i) and 403, 161, Florida Statutes and that his actions threatened navigation, sensitive and federally protected seagrass and the habitat for marine life including sea turtles and manatees. On August 16, 202[sic], the State Circuit Court granted the Department's Motion for Temporary Injunction requiring Mr. Lozman to remove any structures on the property and prohibited placement, deposit, or storage of any

additional structures or fill on the property until further written Order of the Court. *Id.* at 2. On June 6, 2022, Mr. Lozman and the Department agreed to entry of a consent judgment where Mr. Lozman agreed not to fill or deposit any material by any means on or within the property "unless a valid permit is issued by the Department authorizing fill on the property, a written order verifying an exemption is issued; or a court order in a subsequent action for declaratory relief is issued authorizing fill on the property." (DE 134-26).

2. Public Trust Doctrine

When Florida was admitted into the union in 1845, it became the owner of all lands beneath navigable waters. *See Coastal Petroleum Co. v. American Cyaramid Co*., 492 So. 2d 339, 342 (Fla. 1986). The state government holds the lands "in trust for the whole people within" the state. *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353, 355 (1908); *see also*, Article X § 11, Florida Constitution; *Brickell v. Trammel*, 74 Fla 544, 82 So. 221 (1919).

Under the public trust doctrine, the ability of the state to alienate the land is limited; "not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all of the people of the [s]tate for, at least, the purposes of navigation and fishing, and other implied purposes..." *State v. Black River Phosphate Co*., 32 Fla. 82, 13 So 640, 648 (1893).

Mr. Lozman's land is a portion of approximately 311 acres conveyed to the Lake Worth Realty Company by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida in 1924. (DE 134-6).

The deed purports to be issued pursuant to Chapter 7304, Laws of Florida. *Id.* Enacted in 1917, it provided that "'[t]he title to all ... islands, sand bars, shallow banks or small islands made by the process of dredging of the channel by the United States Government located in the tidal waters of the counties in the State of Florida, or similar, or other islands, sand bars and shallow banks upon which the water is not more than three feet deep at high tide and which are separated from the shore by a channel or channels, not less than five feet deep at high tide, or sand bars and shallow banks along the shores of the mainland in which the title is not, at this date, invested in prior parties, is hereby invested in the Trustees of the Internal Improvement Fund of the State of Florida to be held by the State of Florida and disposed as hereinafter provided.'" *Deering v. Martin*, 95 Fla. 224, 229, 116 So. 54 (1928). Section Two of the Act provided that the Trustees had the power to sell and convey the islands and submerged lands after notice. *Id.* at 230. The deed describes the land to be conveyed as "parcels, tracts or shallow banks" and does not reference sovereign lands or navigable waters. (DE 134-6).

The authority given to the Trustees under the 1917 Act is narrowly circumscribed by the public trust doctrine and could not divest the public of ownership of navigable waters. *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d. 339, 342 (Fla. 1986); *Deering*. "Sovereignty lands cannot be conveyed without clear intent and authority and conveyances, where authorized and intended, must retain public use of the waters." *Coastal Petroleum*, at 342 (citations omitted); *see also City of W. Palm Beach v. Bd. of Trs. of the Internal Improvement Fund*, 746 So. 2d 1085 (Fla. 1999) ("[A]ny divestiture of state sovereignty land must be limited by the fact that the State holds

sovereign submerged lands in public trust for the benefit of all citizens of the State.")

Subsequently in 1921, for the purpose of encouraging the development of waterfront property, the Florida Legislature enacted the Butler Act, Chapter 8537, Laws of Florida. Subject to the public trust doctrine and stating that it should not be construed to limit boating, bathing or fishing in the water covering submerged lands, it allowed riparian landowners to fill in and improve their lands so long as the bulkhead, fill or improvements did not interfere with navigability of the waterway. *Id.* To obtain title, however, a riparian owner needed to build wharves or fill in the submerged lands and erect permanent buildings. The Butler Act vested title to land created by the lawful filling of submerged land when the filling became "a fact accomplished." *See, Board of Trustees v. Bankers Life & Casualty Co.*, 331 So. 2d 381 (Fla. 1st DCA 1976).

The Butler Act was found to be constitutional by the Florida Supreme Court, but with limitations. *State ex. rel. Buford v. Tampa*, 88 Fla 196, 102 So. 336 (1924). First the Court acknowledged that the right of navigation in navigable waters was completely within the domain of the federal government under the Commerce Clause. *Id.* Secondly, the Court confirmed that lands under navigable waters were held by the State for purposes of navigation and other public uses, subject to lawful government regulation. *Id.* at 206.

However, with respect to waters that are tidal, but not navigable, the court stated "such waters and lands were held by the State for the use and benefit of the public for boating, fishing and swimming" but that the state could convey such lands to benefit commerce. *Id.* at 209.

In 1957, the Butler Act was repealed because of concern for the rights of the public in submerged sovereignty lands. Chapter 57-362, Laws of Fla.*; Bd. of Trs. v. Sand Key Assoc.*, 512 So. 2d 934, 938 (Fla. 1987).

Chapter 57-362, known as the Bulkhead Act, authorized local governments, subject to approval of the TIITF to establish a bulkhead line beyond which further extension or filling "'shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of the state are inalienably impressed.'" *Gios v. Fischer*, 146 So. 2d 361, 362 (Fla. 1962). The Act also proscribed any extension of lands bordering on or being in navigable waters of the state except where owners who had purchased lands from the Trustees and "'who on June 11, 1957 have permits issued by the United States Corps of Engineers, and [approval] by the trustees of the internal improvement trust fund to fill said lands.'" *Id.* at n. 4. The Florida Supreme Court upheld the constitutionality of the Act: "[T]he limitations of the act as construed place it squarely in line with the decisions defining the nature of the state's title in sovereignty lands in general, and the restrictions inherent in its powers of alienation." *Id.* at 363. The Court continued "in the absence of some overriding necessity a conveyance of public lands or rights in lands which actually results in the impairment of the public servitudes, referred to in the statute here involved, must fail.... no rights lawfully vesting under previous conveyances will be infringed by a proper application of this legislation ... whether it is sustained as police regulation or an exercise of retained power

under the trust doctrine governing sovereign lands..." *Id.*[4]

It is apparent from the history and evolution of Florida law pertaining to submerged lands that Mr. Lozman has never had any right or reasonable expectation to develop those portions of his land. In a case involving application of the public trust doctrine in Mississippi the Supreme Court rejected a takings claim and upheld the state's rights over submerged lands beneath tidal waters. *See Phillips Petroleum Co. v. Miss.*, 484 U.S. 469 (1988). The Court noted that states have interests beneath tidal waters that have nothing to do with navigation, for example fishing, swimming, and resource management. *Id.* at 476. The Court rejected the submerged landowners' claims that they had reasonable expectations of ownership based

[4] The City also argues that because of the indefinite dimensions of his property, Mr. Lozman needs to quiet title as a prerequisite to a takings claim. (DE 135, p. 12–15). Mr. Lozman responds that the boundary dispute issues goes to damages, that a federal takings claim is not an appropriate vehicle for collateral quiet-title litigation. (DE 143, p. 7–8). Early in the case I denied a motion filed by the City to dismiss the complaint because of failure to join the Trustees of the Internal Improvement Fund as an indispensable party. (Motion, DE 12; Order DE 85). Mr. Lozman argued that the Board was not indispensable: "They are free to go right on managing Florida's submerged wetlands and having their own opinions about the meaning of their century-old deed." (DE 23 at 12). I have come to understand, however, that the "meaning" of the "century-old deed" is significant, and I now question both the extent of Mr. Lozman's title to the lands underneath navigable and tidal waters and the authority of the TIITF to have conveyed it. *See*, *Pierce v. Warren*, 47 So. 2d. 857 (Fla 1950) *cert denied* 341 U.S. 914 (1951). The Parties have not briefed this issue, however, and I find it unnecessary to reach it in view of settled background principles limiting the filling of submerged lands.

upon their record title and the fact that they and their predecessor's in interest had paid taxes on the land. *Id.* at 482. Noting that Mississippi courts had consistently affirmed the state's public interest in the lands, the court stated: "We have recognized the importance of honoring reasonable expectations in property interests." *Id.* "But such expectations can only be of consequence where they are 'reasonable' ones." *Id.*

3. *The Comprehensive Plan Governs*

Undeterred by both federal and state obstacles to any ability to bulkhead, dredge, and fill the submerged portion of the land, Mr. Lozman claims a taking occurred when the City passed Ordinance 4147 in 2020. As a matter of Florida Law this argument is also untenable.

As discussed above, in Florida the Comprehensive Plan, once adopted is paramount and non-discretionary. Any inconsistent zoning ordinance cannot be relied upon. Section 163.3194 "is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State." *Pinecrest Lakes, Inc. v. Shidel*, *supra* at 198. *See also*, *Mojito Splash, LLC v. City of Holmes Beach*, 326 So. 3d. 137 (Fla. 2d DCA 2021).

In *Mojito*, the City adopted an amendment to its Comprehensive Plan limiting occupancy in vacation rentals to six persons. Four years later, with constructive notice of the Plan, *Mojito* purchased a vacation rental capable of hosting 12 guests, began marketing the property, and generating significant weekly income. *Id.* at 138.

Subsequently, the City adopted ordinances amending the City's Land Development Code to conform with the Comprehensive Plan restating the occupancy limit and adding an enforcement mechanism. *Id. Mojito* sued the City under the Bert J. Harris, Jr. Private Property Rights Protection Act, Section 70.001-80, Florida Statutes, arguing that newly enacted ordinances inordinately burdened and restricted his property rights.[5] *Id.*

The claim was rejected on a basis which directly applies to Mr. Lozman, "Compliance with a comprehensive plan is mandatory." *Id.* at 141. From the start, *Mojito's* development was inconsistent with, and unauthorized by the City's Comprehensive Plan. *Mojito Splash, LLC v. City of Holmes Beach*, *supra* at 141.

Similarly here, and apart from federal and state background principles governing navigable waters and submerged lands, from December 19, 1991 forward, Mr. Lozman's property was designated by a Comprehensive Plan as a Special Preservation Area precluding use of submerged lands. At no time since he purchased the property in 2014 has Mr. Lozman had any reasonable expectation or right to fill that portion

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[5] The *Bert J. Harris Act* creates a cause of action where a law, regulation or ordinance, as applied, inordinately burdens, restricts, or limits use of property. *See* Fla. Stat. § 70.001. The Act applies to governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. *Id.* Although the Act uses the term "reasonable, investment-backed expectations" found in *Penn Cent. Transp. Co. v. City of N.Y.*, the Harris Act states that it may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking. *Id.* at (1), (9). *See Ocean Concrete, Inc. v. Indian River Cty. Bd. of Cty. Comm'rs*, 241 So. 3d 181 (Fla. 4th DCA 2018).

of his land. *See also, Palm Beach Polo, Inc. v. Vill. of Wellington*, 918 So. 2d 988 (Fla. 4th DCA 2006) (Finding Bert Harris Act claim frivolous and denying taking claim where plaintiff was never entitled to build on land designated as a natural preserve.)

B. Economic and Beneficial Use

Mr. Lozman's *Lucas* claim suffers from yet another flaw. Not only does the takings clause not require compensation when an owner is barred from putting land to a use that is proscribed by existing rules or understandings, but a *Lucas* taking also requires an owner to be denied all economically productive or beneficial uses of land beyond what the relevant background would dictate. 505 U.S. at 1029.[6]

The Supreme Court emphasized this aspect of *Lucas* in *Tahoe-Sierra Prs. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002):

> The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "all economically beneficial uses of his land." *Id.* at 1019. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Id.* at 1017. The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that

[6] In *Lucas*, the trial court found the two beachfront lots to have been rendered valueless and the Supreme Court declined to entertain argument that the finding was erroneous. 505 U.S. at 1019; fn. 9.

> the categorical rule would not apply if the diminution of value were 95% instead of 100%. *Id.* at 1019, n.8. Anything less than a "complete elimination of value" or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*. *Lucas*, 505 U.S. at 1019–1020, n. 8.

Mr. Lozman continues to have what he has always had, a narrow strip of dry land, likely worth more than he paid.[7] The value of his property has not been wholly eliminated.

C. A *Penn Central*-Type Regulatory Taking is not Pled, Nor Would it be Ripe

S. Grande View Dev. Co. v. Alabaster, supra, the other case upon which Mr. Lozman principally relies, is also not helpful to him. The developer in that case bought approximately 547 acres within the City for $1.65 million in 1994. The Master Plan for the development was approved by the City in 1995. *S. Grande View Dev. Co. v. Alabaster* at 1301. Most of the development was finished by 2008, but a 142-acre portion was to be the last phase. *Id*. Under the Master Plan, that portion was zoned R-4 (60-foot-wide garden homes), R-7 (townhomes) and a small part was R-2 (90-foot single family residences). *Id.* Besides the purchase price of the entire parcel, the developer spent an additional $3,532,849.19 to develop that portion. *Id.* at 1304. The recession hit, and the City received complaints from neighbors who worried that the developer would lose the land through foreclosure and another builder "would ruin the aesthetic value of the neighborhood." *Id.* at 1307. In response, in 2011, the City passed a

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[7] The City has filed an appraisal valuing Mr. Lozman's property at $130,000—over five times his purchase price. (DE 134-31).

specific ordinance that targeted only the remaining 142 acres, changing it entirely to R-2 lots. *Id.*

Besides the obvious difference in the nature and timing of the governmental action, *S. Grande View Dev. Co*. applies a different legal theory than that brought by Mr. Lozman. Mr. Lozman claims a complete elimination of his property's value – a *Lucas* claim. The *S. Grande View Dec. Co.* is a regulatory-takings challenge governed by the standard set forth in *Penn Central Transp. Co. v. New York City*, 458 U.S. 104 (1978). *See also*, *Lingle v. Chevron, U.S.A., Inc*., 544 U.S. 528 (2005).

To be clear, Mr. Lozman expressly concedes that he is not proceeding on a *Penn Central*-type regulatory takings theory. The *Penn Central* factors primarily concern the economic impact of a regulation on the claimant and, particularly the extent to which the regulation interfered with distinct investment-backed expectations. *Penn Central*, *supra* at 539. In addition, whether the governmental action amounts to a physical invasion or merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" may be relevant in discerning whether a taking has occurred. *Id.* On the other hand, in the *Lucas* context, the complete elimination of a property's value is the determinative factor. *See*, *Lucas*, *supra* at 1017. *See also*, *Lingle v. Chevron*, *supra* at 539.

"A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1005 (1984) (citation omitted) (finding that after Monsanto was on notice of the manner EPA was authorized to use its data there could be no reasonable, investment based expectation that EPA would keep its

data confidential). If analyzed as a regulatory taking, a claim not made in his Complaint, Mr. Lozman's purchase of largely submerged land with notice that it fell within a Special Preservation Land Use designated area, can justify few if any legitimate investment-backed expectations. He most certainly had no reasonable expectation to bulkhead, dredge and fill his land for residential development.

At present, Mr. Lozman has applied for a permit from the Army Corp of Engineers to moor his floating home on his property—precisely what his complaint states his intent was when he acquired the property. (DE 1 at ¶16). Mr. Lozman has also supplemented the summary judgment record with permits which he claims indicate that the state and federal government "will allow a sizeable dock (big enough to accommodate floating homes, registered vessels, livable yacht-ArKup) over the water portion of the Lagoon which spans Plaintiff's property." (DE 193). But he has yet to seek such a permit.

IV. CONCLUSION

In short, under both federal and state law, settled background principles deny Mr. Lozman any right to fill the submerged portion of his land. His *Lucas* claim fails. It remains uncertain whether he can build a dock or moor his floating home at the property. He has yet to apply for necessary permits. A *Penn Central* regulatory taking claim has not been pled, and in any event would not be ripe.

For the foregoing reasons, it is hereby ORDERED and ADJUDGED that:

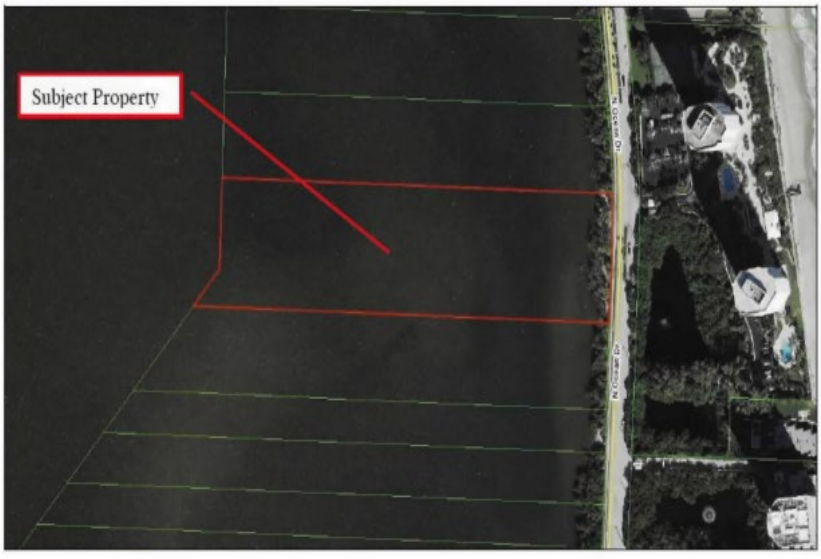
(1) Plaintiff's Motion for Partial Summary Judgment (DE 137) is DENIED.

(2) Defendant's Motion Summary Judgment (DE 135) is GRANTED.

(3) Judgment will be entered by separate order.

Appendix A

The images and text herein are excerpted from Docket Entry 134-31 at 12, 18.



Northern portion of the subject looking southwest from North Ocean Drive

Northern portion of the subject looking west from North Ocean Drive

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.:

FANE LOZMAN,

Plaintiff,

v.

CITY OF RIVIERA BEACH, FLORIDA

Defendant.

JURY TRIAL DEMANDED

COMPLAINT

Fane Lozman, by and through his undersigned attorneys, in accord with the Federal Rules of Civil Procedure, alleges (in a short and plain nature, cf. Fed. R. Civ. P. 8), the following:

NATURE OF THE ACTION

1. This is an action to recover damages from the City of Riviera Beach, Florida, ("City"), for the taking of Lozman's private property without just compensation.

JURISDICTION AND VENUE

2. This Court has original jurisdiction pursuant to 28 U.S.C. §1331 and 42 U.S.C. § 1983.

3. Venue is proper before the United States District Court for the Southern District of Florida because the

private property taken by the City is located within Palm Beach County and therefore it is within the jurisdiction of the West Palm Beach Division of this Court. 28 U.S.C. § 1391(b)(2).

THE PARTIES

4. Fane Lozman is a former United States Marine Corps officer. He moved to the City of Riviera Beach in March of 2006.

5. The City is a municipal corporation in Palm Beach County, Florida.

FACTUAL ALLEGATIONS

6. In February 2014, Lozman purchased a parcel of land within the City at 5101 North Ocean Drive ("Lozman Parcel" or "Parcel"). The Parcel is 7.76± acres in size, is located on Singer Island, about two miles north of the Palm Beach Inlet; most of it lies within the Lake Worth Lagoon ("Lake").

7. The legal boundaries of the Lozman's Parcel, per the September 2021 Palm Beach County Property Records card is: 22/23-42-43, N 300 FT OF S 3464.8 FT OF GOV LT 1 LYG W OF SR 703 & SUBMRG LANDS LYG BET N & S BOUNDARIES.

8. In 1924, the State of Florida, acting thorough the Trustees of the Internal Improvement Trust Fund (TIITF), sold 311± acres via TIITF Deed 17,146 ("TIITF Deed"). The Lozman Parcel is within the lands conveyed by that TIITF Deed. The TIITF Deed expressly states that the conveyance was made pursuant Chapter 7304, of the Acts of 1917, Laws of Florida.

9. As a matter of law, the TIITF Deed conferred the right to bulkhead and fill the property that it conveyed subject only to compliance with Section 1290 of the

General Statutes of 1906, which is currently codified as Fla. Stat. § 309.01.

10. Pursuant to the rights conferred by similar TIIFT conveyances, more than eighty percent (80%) of the frontage along the Lake shore has been bulkheaded and filled.[1]

11. Out of the 311 acres conveyed by the TIITF Deed, approximately 160 acres have been dredged, bulkheaded and filled.

12. Until recently, all of the land conveyed by the TIITF Deed was zoned for residential development and all parts of it that have not yet been filled, including Lozman's Parcel, were zoned "RS-5." The RS-5 designation allows for development of single-family homes with a density of no more than five units per acre.

13. Consistent with the City's historical zoning, all of the filled portions of the lands conveyed by the TIITF Deed have been developed for residential use.

14. In 1982, the City adopted Riviera Beach Code of Ordinances ("RB Code") Section 31-118 (modified in 1989), which provides in part:

> Property development standards. The property development standards in the RS-5 single-family dwelling district are as follows: (1) Minimum property size: 8,000 square feet, *except any lake, pond, wetland, marsh, lagoon, estuary, bottomland, etc., that is filled after December 6, 1989, shall require a* ***minimum dry lot size of one acre***. (Emphasis supplied).

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[1] In its natural state the Lake was approximately 21 miles long and up to one mile wide.

15. When Lozman purchased the Parcel, he expected that it could be developed for use as single-family residential lots meeting or exceeding the one-acre minimum dry lot size requirement.

16. Despite Lozman's expectation as to the highest and best use for his Parcel, his intent was to use it for his floating home, a use consistent with his first United States Supreme Court victory against the City.[2]

17. Lozman sued the City in February 2016, (*Lozman v. City of Riviera Beach*, 15th Judicial Circuit Court, Palm Beach County, Case No.: 2016CA001527), filing a petition for a writ of mandamus to have a street address assigned to the Lozman Parcel.

18. In mid-2016, Lozman brought his floating home to the Parcel and moored it there.

19. Contemporaneously, Lozman sought and obtained a Homestead designation for the Parcel from the Palm Beach County Tax Assessor's Office pursuant to Fla. Stat. § 196.031.

20. In November 2016, the Court entered an order granting Lozman's petition and ordered the City to assign a street address to the Lozman Parcel.

21. After the street address was assigned, 5101 North Ocean Drive, Lozman installed a mailbox and started receiving his mail.

22. In 2018, a City zoning official, Jeffrey Gagnon, told Lozman that he was going to see to it that Lozman's mail delivery was terminated and that Lozman would never receive any permits for his Parcel.

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[2] See *Lozman v. City of Riviera Beach*, 568 U.S. 115, 133 S. Ct. 735 (2013).

23. Shortly after Mr. Gagnon's statement the United States Postal Service stopped delivering mail to Lozman's Parcel. Upon inquiry, the local Post Office advised Lozman service had been terminated at the City's request.

24. Despite Mr. Gagnon's statement, Lozman sought permits in furtherance of his use of his Parcel.

25. The City's chief building official determined that Lozman was entitled to a permit for electrical service improvements and issued him a permit for temporary service in the spring of 2019. Shortly after this permit was issued, the City fired its chief building official.

26. In the fall of 2020, the new chief building official told Lozman to install a permanent power poll and move his electrical service from the temporary structure to the permanent poll.

27. On October 7, 2020, over the objection of Lozman and other affected TIITF Deed parcel owners, the City Council adopted Ordinance No. 4147, which changed the zoning for their properties from RS-5 to "Special Preservation". This ordinance is now codified as RB Code sections 31-521 through 31-523.

Sec. 31-522 – Use Regulations provides:

> (a) Uses permitted. The following uses are permitted in the SP special preservation district:
>
> > (1) Private residential fishing or viewing platforms and docks for non-motorized boats may be permitted subject to the following regulations:
> >
> > a. Platforms and docks shall not extend outward past the mean low water line.

b. Construction must be fully achievable from an on-shore location.

c. Permits must be obtained from DEP and/or all other applicable regulatory agencies.

(2) Mitigation land banks.

(3) Preservation land.

(b) Special exception. The following uses may be permitted in the SP special preservation district:

(1) None.

(c) Uses prohibited. The following uses shall be prohibited in the SP special preservation district:

(1) Any use not specifically stated as a use permitted within this section. (Ord. No. 4147, § 2, 10-7-20)

28. After the City downzoned the Parcel, the City notified Palm Beach County Property Appraiser of the zoning change. As a result, Lozman's homestead designation for the Parcel was terminated.

29. In early 2021, Lozman installed a permanent power pole on the Parcel and made arrangements in anticipation of moving the service from the temporary structure to the permeant poll.

30. Similarly, Lozman attempted to submit a permit for water service and was told by the City's Utility Department that the City would not accept a permit application.

31. Lozman also contracted with Martin Fence Company to construct a boundary fence for his uplands. The City denied the fence permit application that the company had submitted on Lozman's behalf

and thereby deprived Lozman of the ability to exclude the public from access to his Parcel.

32. In February, 2021, the City advised Lozman that he could not have a permit for permanent electrical service and that his permit for temporary electrical service had been terminated.

33. By its actions described above, the City has stripped Lozman's Parcel of all economically viable uses.

COUNT I
TAKING WITHOUT JUST COMPENSATION

34. Lozman realleges the averments made in paragraphs 1 through 33 above as if fully set forth herein.

35. All conditions precedent to this action have either occurred, have been waived and/or have been otherwise satisfied.

36. The City has taken Lozman's Parcel.

37. The City has an obligation to pay Lozman just compensation for his Parcel but it has not.

38. Damages for a taking include the fair market value for the land based on the highest and best use supported by reasonable expectations on the date of the taking, interest from the date of the taking, cost of suit and attorney fees.

WHEREFORE, Plaintiff, FANE LOZMAN, requests that this Court enter an order awarding Lozman a money judgment for damages together with interest thereon, costs of this action, reasonable attorney fees and all other relief as the Court may deem appropriate.

JURY TRIAL DEMANDED

Plaintiff respectfully requests that the amount of his damages be tried by jury.

Respectfully submitted,

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF FLORIDA

Case No: 22-80118-CV-MIDDLEBROOKS/
Matthewman

FANE LOZMAN,

Plaintiff,

v.

CITY OF RIVIERA BEACH,

Defendant.

AFFIDAVIT OF PLAINTIFF FANE LOZMAN IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT, THAT WILL BE SIGNED AS AN UNSWORN DECLARATION

My name is FANE LOZMAN, and I am the Plaintiff. I have personal knowledge of the facts set forth in this Affidavit, and they are true and correct to the best of my knowledge. This affidavit will be filed as an unsworn declaration pursuant to 28 U.S.C. §1746. I have COVID and am not going to visit a notary, since it is not necessary to have this filing notarized. My declaration has the same force and effect as a notarized, sworn affidavit. *Id.*

COMES NOW, Fane Lozman, pursuant to 28 U.S.C. §1746, while in the State of Florida, hereby declares and says the following under penalty of perjury.

1. This pending federal regulatory taking case will complete the trifecta of my federal legal actions with

the City of Riviera Beach ("City"). My first case dealt with the improper federal admiralty arrest of my floating residential structure ("floating home"), and my second case was a federal civil rights case involving a retaliatory arrest while speaking at a City Council meeting. The Court is familiar with both cases that I won at the U.S. Supreme Court, having been assigned the remand for my free speech case from the 11th Circuit.

2. Paragraphs 3 through 12 detail the history of my first floating home when I moved it to the City and its subsequent vindictive destruction by City officials. However, I wanted to continue living in Riviera Beach, which motivated me to purchase my property at 5101 North Ocean Drive. I used this property to live on a new floating home with plans to develop conventional and stilt houses. Attachment 1, Tidal House at Renegade (stilt home renderings).

3. I resided continuously on my floating home that served as my homesteaded primary residence, at the Riviera Beach City Marina, from March 19, 2006, until its federal arrest on April 20, 2009. I filed a Declaration of Homestead for my floating residential structure with the Clerk of the Circuit Court, Office of the County Recorder, Palm Beach County, Florida, on October 18, 2006. Attachment 2, Homestead Declaration.

4. The City of Riviera Beach filed an eviction action in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County on September 11, 2006 (Case No. 502006CC011382), to remove my floating home from the City marina.

5. I won, *pro se*, a three-day jury trial that prevented the City from evicting my floating home from the City marina. Attachment 3, jury verdict.

6. The original owner did not build my floating home to be a vessel, and it is not a vessel per Florida Statute. According to the 2020 Florida Building Code, 7th Edition my floating home was legally required to be built to the same standards as any land-based house.

> 102.2 Building- The provisions of the Florida Building Code shall apply to the construction, erection, alteration, modification, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every public and private building, structure or facility or floating residential structure, or any appurtenances connected or attached to such buildings, structures or facilities.

7. The City turned off the electricity to my floating home on April 1, 2019. I filed a motion with Circuit Court Judge Peter Evans, explaining how the City had illegally turned off the electricity to my floating home, in direct violation of his final order that denied the eviction. Judge Evans held a hearing and entered an order on April 17, 2009 directing the City to restore the electricity to my floating home. The City intentionally ignored Judge Evans order and never restored my power. Attachment 4, Court order to restore electricity.

8. The City arrested my floating home in a federal admiralty action on April 20, 2019. Three U.S. Marshalls coordinated the arrest procedure and were present to coordinate the towboat that pulled it out of its slip and moved it to a custodian marina on the Miami River, a short distance from Miami International Airport.

9. I, along with a Channel 25 television cameraman, Mr. Bryan Murphy, witnessed Riviera Beach Police Commander Mitchell coming toward us on April 20, 2019, while the U.S. Marshalls were arresting my

home and turning it over to the towboat. Mitchell was visibly upset and was screaming at the top of his lungs that he would arrest Mr. Murphy and me if we did not stop filming the admiralty arrest procedure. When we attempted to explain to him that we had a First Amendment right to film the admiralty arrest from the public parking lot, which was over 200 feet from where my floating home was moored, Mitchell said it did not matter and that Murphy and I would be arrested. Murphy was intimidated by Mitchell and stopped filming.

10. The City purchased my floating home at a U.S. Marshall Sale on the steps of the Dade County Courthouse in downtown Miami on February 9, 2010, by outbidding the public that attended and vindictively destroyed my home at taxpayer expense.

11. On January 15, 2013, the U.S. Supreme Court entered a landmark admiralty opinion that my floating residential structure did not come under federal admiralty law, but under State jurisdiction.

12. The national media coverage before and after I won my admiralty case at the U.S. Supreme Court was significant. I was interviewed live on Fox and Friends the morning before the oral argument and the day after I won my case. In addition, numerous Associated Press stories were written about my case before the Supreme Court granted certiorari. The New York Times, Washington Post, Wall Street Journal, the Palm Beach Post, Miami Herald, and Sun-Sentinel, were just some of the print publications that covered my admiralty case.

13. Shortly after my U.S. Supreme Court victory, an enthusiastic member of the Fane Fan Club[1], Mr. Daniel

[1] The Fane Fan Club is a humorous name for a non-existent club that Lozman uses to identify those individuals that have

Taylor installed a regular street with the name "Lozman's Cove" on his property at 5280 North Ocean Drive. Mr. Taylor also purchased a used police car and had the logo Lozman's Cove painted on its side, commissioned a 2' by 3' duplicate of the courtroom artist's color sketch[2] of my Supreme Court oral argument that hangs behind his desk in his real estate office and coordinated for North Ocean Drive to have a street sign for the FDOT's adopt a highway sign labeled "Lozman's Cove, Sustainable Development."

14. Taylor's public actions over Lozman's Cove resulted in a woman in North Florida, Ms. Omah M. Kiser, becoming aware of my floating home battle after my victory at the U. S. Supreme Court. Ms. Kiser owned a piece of property on Singer Island that was initially purchased as two parcels by her father in December 1947 and January 1948. Attachment 5, title chain.

15. I met with Ms. Kiser, and we became friends. Ms. Kiser told me she wanted to give me her property for free because she admired my battles with the City; she was up in years and was not going to develop the property herself. Ms. Kiser also told me that by owning her property, I could place a floating home on the property, and the City could never seize and destroy it because the property was private.

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reached out to him, both locally and nationally, and have expressed their gratitude to Lozman for his legal battles against the City of Riviera Beach and for his passion and never wavering commitment to fighting political corruption and upholding the First Amendment. In addition, Lozman has graciously talked by phone, met in person, and given lectures at the University of Miami Law School along with political organizations and other groups, discussing his legal battles with the City.

[2] The Sketch and Framing were $4700.

16. I told Ms. Kiser that I wanted to pay her something for the property and we agreed on $24,000. I bought the property from Ms. Kiser on February 8, 2014, and placed it in my Renegade Trust. I remained friends with Ms. Kiser, and visited her a couple of times until her passing in 2018. Attachment 6, purchase deed.

17. Ms. Kiser told me that before her father purchased the property, it had a small restaurant, but it had been destroyed in a storm and was not rebuilt.

18. I requested a street address from the City after I purchased the property, and the City refused to provide me one. Instead, the development director for the City, Ms. Mary McKinney, and the assistant development director Mr. Jeffrey Gagnon, told me that I would never get an address. The reason for this is that without an address, they told me I would never be able to get any permit from the City. They stated that a City building permit, electrical permit, fence permit, or water hookup all required a street address.

19. I have a passion for fighting political corruption and have had great success using my investigative techniques, in cooperation with State and Federal officials, to remove corrupt elected officials from office, via arrest or resignation. During the time I was trying to get an address, I received a tip that Ms. McKinney had been corrupted by a private developer. Specifically, McKinney purchased her Singer Island house from Mr. Dilip Barot, the developer of the Amrit condominium (3100 North Ocean Drive, Singer Island), at a discount to the home's fair market value. In exchange for purchasing Barot's home, McKinney gave Barot multiple extensions of the Amrit site plan that he was not entitled to over the years when the site plan should have expired, per the City code. Once a site plan expires, it has to be resubmitted from scratch. Barot

did not have the financing to build the Amrit, and the site plan extension game went on for many years. It also resulted in Barot being able to use the coastal construction line from his 2005 permit, instead of a more restrictive line that would have given him less density on his property when his project was finally built. McKinney also helped facilitate in 2004 three variances that Barot wanted. Lozman submitted his findings on McKinney to the public corruption unit at the State Attorney's office and spoke publicly about McKinney's corrupt behavior. Attachment 7, Letter seeking Amrit variances from Richard Carlson.

20. I filed a lawsuit against the City, specifically a Petition for Writ of Mandamus, requesting for the Court to exercise its authority and direct the City to issue me an address for my property at 5101 North Ocean Drive. Lozman v. City of Riviera Beach, Circuit Civil Division AJ, Case No. 2016CA001527.

21. The City's outside attorneys milked the case for all they could. Still, ultimately, with the help of the Palm Beach County Property Appraiser, Mr. Gary Nickolits, the Court entered an order directing the City to issue me an address after a harsh dressing down to the City's attorney at the hearing. The Court noted in its order that it rejected all of the City's arguments and found that the "City was not able to articulate any legitimate basis for declining to issue a street address (although Petitioner submits it is because of "bad blood" between these parties). Attachment 8, Court Order directing City to issue me an address in five days.

22. The Petition for Writ of Mandamus also had a second count: to reopen the beach access easement across from my property that the City shut down. The Court agreed with me and entered a second order

directing the public easement to the beach to be reopened. Attachment 9, Court Order directing the City to maintain the public beach easement.

23. When I met Mr. Daniel Taylor in 2013, he was ecstatic that I had won my admiralty case at the U.S. Supreme Court. Taylor told me he could now build a dock and live on his property in a principal residential structure since the U.S. Supreme Court had ruled a floating home is a residential structure. The City had told Taylor previously that he needed a residential structure on his property to have a dock when it denied his dock permit.

24. The Florida Department of Environmental Protection and the U.S. Army Corps of Engineers issued Taylor a dock permit. The City Building Official, Ms. Ladi March Goldwire, also issued Taylor a dock permit, but when the City leaders became aware of this permit, the permit was revoked and Ms. Goldwire was fired.

25. I placed a two-story, 3000-square-foot floating home on his property in 2016. My floating home was built in the 1960s and appeared in Frank Sinatra's movie Lady in Cement.

26. During the final movement of my floating home from the Intracoastal waterway to my property at 5101 North Ocean Drive, three individuals approached me in a small, white rigid inflatable vessel. They told me that the City leaders had told me to: i. move out of the City; ii. not to bring a floating home to my property; and iii. they would see to it that I would not have a floating home on my property. These three men then repeatedly attempted to crash a small, remote control drone into my face before they realized residents were

witnessing their actions on balconies on the east side of North Ocean Drive and they left.

27. Unknown vandals intentionally sank my floating home at my 5101 North Ocean Drive property. A condominium resident across the street from my property saw men late at night in the water on the side of my floating home with underwater lights on the night my home sunk.

28. My floating home had its deck plates removed, and these vandals punched holes through the wooden hull that only had 1/8th inch of fiberglass covering it.

29. I purchased a metal shipping container in 2019 and had Legacy Brothers convert it into a container home for $45,000. This general contracting firm makes and installs container homes in multiple municipalities in Palm Beach County. My container home has two sliding impact doors, impact windows, a tiled bathroom with shower and compositing toilet, a kitchen, electrical outlets, plumbing, and a rooftop deck.

30. I placed my container home on concrete floats and moved it to my Singer Island property.

31. City leaders immediately lobbied the Army Corp and FDEP to remove my floating home from my property. Ultimately, both the Department of Justice in Federal Court and the FDEP in State Court instituted legal proceedings to have me remove my floating home from my private property.

32. I moved my floating container home to the bulkhead line, west of the Riviera Beach city limit.

33. Per a public records request, I had determined where the bulkhead line was by obtaining a copy of The Trustees of the Internal Improvement Fund, Engineering Division, Map No. 50-B-4. This map was

prepared in July 1963, and it shows the Bulkhead Lines & Conveyances in Palm Beach County, for Township 42 South-Range 43 East, Section 22. This map also shows the commonly used Section 22 marker set in 1915, as the same market that the Trustees of the Internal Improvement Fund have used for defining the western edge of TIITF Deed 17,146. The western edge of the TIITF deed is also identical to the City's Bulkhead, as described in City Ordinance #1041, Section 6-30, Area east of Intra-Coastal Waterway. This section references the City's bulkhead as using the western boundary of TIITF Deed 17,146. Attachment 10, Trustees of the Internal Improvement Fund, Map No. 50-B-4

34. Martin Fence submitted a building application for a chain link fence for my property, and the City denied it.

35. My request for City water and sewer service was denied.

36. I installed a mailbox shortly after I obtained an address for my 5101 North Ocean Drive property, and I received mail there for a couple of years until the City learned about my mailbox. The City then contacted the USPS to stop delivering my mail, which it did.

37. The City contacted the Palm Beach Property Appraiser and had my homestead exemption revoked starting with the 2022 tax year. I had my homestead exemption for five (5) tax years from 2016 to 2021.

38. The City downzoned my property when it adopted Ordinance No. 4147 on October 7, 2020. This downzoning from residential (RS-5) to "Special Preservation" was over my objections.

39. My downzoning objections for my 5101 North Ocean Drive property were made in writing by Ms. Kerri Barsh, a shareholder at the Greenberg Traurig law firm and the co-counsel on my two U.S. Supreme Court cases with Stanford Law School's Supreme Court Litigation Clinic. Attachment 11a-May 14, 2019, and 11b-June 17, 2020, letters.

40. I received a temporary electrical permit from Chief Building Official Ms. Ladi March Goldwire. The City fired Ms. Goldwire based on her issuance of my electrical permit and a fence permit for a property I have an interest. The City denied my permit request for permanent electrical service.

41. The City began a lengthy code enforcement action that resulted in an order from the City's Special Magistrate for code enforcement directing that I remove my electrical service. I complied with the order and removed it.

42. City elected officials, along with their staff and the City police have constantly harassed me, going back to 2006 when I first stepped up to fight the City's redevelopment project. This project was going to give away the City Marina to a private developer along with 2200 homes that the City was going to take via eminent domain to construct a multi-billion dollar upscale community and mega-yacht marina. I had a major problem with the plan because the City Marina had been donated in perpetuity by Mr. Charles Newcomb for the recreational use of the City's residents.

43. The City constantly harasses me. The highlights include five false arrests (two arrests were *nolle prosse* and one *No Filed*: arrest at City Council meeting in November 15, 2006, Case No. 50-2006-MM-026828, *nolle prosse* January 22, 2008; ii. arrest at City Marina

in June 2008, *nolle prosse* prior to Arraignment on July 22, 2008; and iii. another arrest at a City Council meeting, April 2009, Case No. 50-2019-MM-0006978, *No Filed* prior to Arraignment on August 14, 2019) and then the two arrest for trespassing on the dock on my property and kicking a gate on my property, Case No. 50-2021-0001239 and No. 50-2021-000937. Case 0001239 was *nolle prosse* shortly before trial, and case 000937 was tried to a jury and I received a judgment of acquittal after the close of the State's case) and of course there was the retaliatory federal admiralty arrest of my floating home that ended in a landmark decision and reversal at the U.S. Supreme Court.

44. When I lived at the City marina, the police were regularly called when I would walk my dog.

45. The City even was obsessed with me, my finances, why Governor Bush was supporting my redevelopment battle, and the reason that Governor Bush sent the Florida Department of Law Enforcement to investigate Riviera Beach elected officials. At a closed door meeting, City leaders agreed to hire a private investigator to follow me around. The meeting transcription was later released as a public record.

46. Without my knowledge, the City served my bank and other institutions subpoenas to get my financial records in the admiralty case, and shared these records with an attorney that never filed an appearance in my admiralty case. I was never sued *in-personam* and it was only an *in-rem* action for a month's rent, yet the City received 5 years of my financial records! My financial records were ordered returned by Magistrate Lurana Snow to the bank and insurance company that produced them, and she awarded me a $500 sanction, and the Clerk of Court a $500 sanction. Attachment

12, Emergency Motion to Quash Subpoenas and Attachment 13, Magistrate's Order

47. The majority of the City's leaders are still livid that I purchased my property on Singer Island, because they did not want me to live in what they told me was their City.

48. An example of an elected official's behavior is when City Councilperson Bruce Guyton called me "a rapist, a political extortionist and a faggot cross-dressin piece of shit" at a City Council meeting. Guyton said I would never get an address because the City has a home rule charter and can do what it wants. The South Florida Gay News wrote a story on November 20, 2014, that is a must-read, "Riviera Beach City Councilman Verbally Attacks Resident at Public Meeting." Attachment 14.

49. I received a number of death threats over the years. One non-verbal threat involved the intentional, partial cutting of my truck's power steering hose, with the plan that I would be driving down the road and lose control of my steering. The police confirmed this when they went to Arrigo Dodge to examine the power steering hose. According to the technician that repaired my vehicle, a Riviera Beach detective attempted to obtain fingerprints from the hose and the surrounding area.

50. In 2013, Daniel Taylor provided me with a copy of the Stipulation and Final Judgment in *Palm Beach Isles v State of Florida Department of Environmental Regulation and Trustees of the Internal Improvement Trust Fund of the State of Florida*, Case No. 90-7742-AJ. This stipulation and final judgment gave me additional confidence that the purchase of my property at 5101 North Ocean Drive would be able to be developed. Attachment 15, Stipulation and Final Judgment.

51. In 2013, Daniel Taylor provided me with a Final Order in Joan B. Taylor v. City of Riviera Beach, Case No. CL 00-2620 AJ. This final order gave me additional confidence that the purchase of my property at 5101 North Ocean Drive would be able to be developed. Attachment, 16, Final Order

52. In 2013, Daniel Taylor explained how he sold his family's seventeen (17) acre submerged land property surrounding Little Munyon Island, 3000 feet west from his property at 5280 North Ocean Drive, for $3.75 million in 2006. Taylor stated, and the Palm Beach Property appraiser records confirm, that this sale was for $220,000/acre. This sale was with Rybovich, which needed the land to mitigate its mega-yacht marina expansion in West Palm Beach.

53. Transcript of meeting between Daniel Taylor and City of Riviera Beach Development Director on September 8, 2021. Attachment 17, transcript.

I hereby declare under penalty of perjury that the foregoing is true and correct. Executed on December 21, 2022.

Dated: December 21, 2022

By: /s/ Fane Lozman
Fane Lozman