IN THE SUPREME COURT OF FLORIDA

Case No. SC16-1888

CHARLES N. GANSON, JR.,
as Personal Representative of
the Estate of Molly Beyer,

Petitioner-Appellant,

v.

CITY OF MARATHON, FLORIDA, and the
STATE OF FLORIDA,

Respondents-Appellees.

On Appeal from the District Court of Appeal of the
State of Florida, Third District, Case No. 3D12-777

JOINT JURISDICTIONAL BRIEF OF APPELLEES, CITY OF MARATHON, FLORIDA AND THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

In February 1970, Gordon Beyer and Molly Beyer ("Beyers") purchased an offshore island known as Bamboo Key ("Property"). The Property is almost nine acres in size. At the time of purchase, the applicable zoning for the Property was General Use ("GU"), which generally allowed one single-family home per acre to be built on the Property. On September 15, 1986, Monroe County's 1986 Comprehensive Plan and Land Development Regulations ("1986 Regulations") went into effect. The 1986 Regulations changed the Property's zoning from GU to Open Space ("OS"), which, among other things, imposed a density limit of one dwelling unit per ten acres on the Property. The Beyers did not challenge the adoption of the 1986 Regulations. In 1996, Monroe County adopted its new Comprehensive Plan ("1996 Plan"), which identified the Property as a bird rookery and restricted the development and use of the Property to camping, bird watching and other types of nature related activities. The Beyers did not challenge the adoption of the 1996 Plan.

The City of Marathon ("City") incorporated in November 1999, and the Property became part of the City. The City adopted the 1996 Plan and Monroe County's land development regulations as its interim comprehensive plan and land development regulations. Eventually, the Beyers refiled their Beneficial Use

Determination ("BUD")[1] application with the City and a Beneficial Use Hearing Officer ("Hearing Officer") conducted a BUD hearing. Among the findings made by the Hearing Officer was that under the 1996 Plan the Property became completely unbuildable due to no development allowed on offshore islands documented as a bird rookery. Nonetheless, the Hearing Officer recommended denial of the BUD application because, among other things, he made a factual determination that the award of sixteen points to the Property under the City's Residential Rate of Growth Ordinance ("ROGO") constituted reasonable economic use of the Property. Based upon the Hearing Officer's recommendation the City denied the BUD application.

The Beyers sued the City and the State of Florida ("State") for inverse condemnation. Initially the trial court granted summary judgment in favor of the City and State, finding the Beyers' Complaint asserted a per se takings claim that was barred by the statute of limitations. The Beyers appealed the grant of summary judgment to the Third District Court of Appeal. The Third District Court of Appeal reversed the trial court's ruling on the statute of limitations after determining the facts alleged in the Beyers' Complaint constituted an *as-applied* takings claim, and the 1996 Plan did not deprive the Beyers of all reasonable economic use of their

[1] §§ 9.5-171 – 9.5-179, "Beneficial Use Determinations" of the Monroe County Land Development Regulations as the same existed on the date of the City's incorporation. The Beyers initially filed their request for a Beneficial Use Determination with Monroe County, prior to the City's incorporation.

Property. *Beyer v. City of Marathon*, 37 So.3d 932, 933-34 (Fla. 3d DCA 2010) (*Beyer I*).

On remand, the trial court again granted summary judgment in favor of the City and State, concluding the Beyers failed to produce any evidence the 1996 Plan deprived them of reasonable economic use of their Property, or frustrated their reasonable investment-backed expectations. The trial court also concluded the doctrine of laches barred the Beyers' claim. Once again, the Beyers appealed the summary judgment order. The Third DCA held that laches did not bar the Petitioners' action, but did determine "the Beyers were not deprived of all economically beneficial use of the property." *Beyer v. City of Marathon*, 197 So.3d 563, 567 (Fla. 3d DCA 2013) (*Beyer II*). Petitioner[2] seeks to invoke this Court's discretionary jurisdiction asserting *Beyer II* expressly and directly conflicts with Florida per se categorical takings decisions.[3]

SUMMARY OF THE ARGUMENT

[2] Gordon and Molly Beyer are deceased; Petitioner is the Personal Representative for Molly Beyer's Estate.

[3] To the extent Petitioners imply or argue that *Beyer II* conflicts with decisions of the United States Supreme Court, such alleged conflicts do not form the basis for review in this court. *First Union Nat'l Bank v. Turney*, 832 So. 2d 768, 770 (Fla. 2d DCA 2002)("review under Article V, section 3(b)(3) of the Florida Constitution (requiring express and direct conflict) is unavailable "where the opinion below establishes no point of law contrary to a decision of th[e Supreme] Court [of Florida] or another district court.")(alteration in the original); citing *Bunkley v. State*, 882 So.2d 890, 913 (Fla. 2004).

The decision below does not conflict with any decision of this Court or any of the District Courts of Appeal as Petitioner contends. The Third District expressly cited and correctly applied the principal decisions with which Petitioner claims a conflict, *Lucas v. So. Carolina. Coastal Council*, 505 U.S. 1003 (1992) and *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 137 (1978), when it concluded the Beyers were not deprived of all beneficial use of their property.

ARGUMENT

I. PETITIONER IMPROPERLY RELIES ON FACTS AND LEGAL CONCLUSIONS OUTSIDE OF THE MAJORITY DECISION

Petitioner predicates his jurisdictional argument on facts and legal conclusions not found within the four corners of *Beyer II*, but rather relies on findings and legal conclusions from a single judge's dissent from a *per curiam* denial of a Motion for Rehearing En Banc of *Beyer II*. *See* Pet. Brief at Pg. 1 n. 2, and Pg. 3. As this Court has consistently opined "[C]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the **majority decision**. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction" (emphasis added). *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). *Jones v. Florida Ins. Guar. Ass'n, Inc.*, 908 So.2d 435 (Fla 2005). *See generally Wainwright v. Taylor*, 476 So.2d 669, 670 (Fla. 1985); *see also* Art. V, § 3(b)(3), *Fla. Const.* For this reason alone, this Court should deny Petitioner's request to invoke the Court's conflict jurisdiction.

II. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH FLORIDA CASE LAW REGARDING "PER SE, FACIAL TAKINGS" BECAUSE THE THIRD DISTRICT COURT OF APPEAL PROPERLY DETERMINED THIS CASE PRESENTS AN "AS APPLIED" TAKINGS CLAIM[4]

Petitioner alleges "[T]he Third District's decision [in *Beyer II*] conflicts with Florida case law regarding total takings—also known as a "*Lucas* takings," after *Lucas v. So. Carolina. Coastal Council*, 505 U.S. 1003 (1992)." Pet. Brief at 4. Petitioner then summarily concludes that: "[f]or the Third District to conclude a total taking did not occur conflicts with *Lucas*." Pet. Brief at 5. Nothing could be further from the truth.[5]

Here, not once - but twice - the Third DCA evaluated the Beyers' alleged takings claim in a manner wholly consistent with *Lucas* and the Florida cases cited by Petitioner.[6] In *Beyer I* the Third DCA stated "[a] facial taking, also known as a per se or categorical taking, occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owner of all

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[4] In his Jurisdictional Brief, Petitioner alternately uses "Lucas taking", "per se taking" or "a facial taking" to describe the Beyers' alleged inverse condemnation claim against the City and State. For brevity and clarity, the City and State will use the terminology used by the Third District Court of Appeal in *Beyer I* and *Beyer II* - "per se, facial taking"

[5] This Court previously declined to invoke its discretionary jurisdiction in two cases with analogous facts and similar "conflict" arguments as here. *McCole v. City of Marathon*, 36 So.3d 750 (Fla. 3d DCA 2010), *rev. denied*, 51 So.3d 1155 (Fla. 2010), and *Sutton v. Monroe County*, 34 So.3d 22 (Fla 3d DCA 2010), *rev. denied*, 51 So.3d 1155 (Fla. 2010).

[6] *Keshbro, Inc. v. City of Miami*, 801 So.2d 864 (Fla. 2001) and *City of St. Petersburg v. Bowen*, 675 So.2d 626 (Fla. 2d DCA 1996).

reasonable economic use of the property. We disagree that the mere enactment of the 1996 Plan, on its face, deprived the Beyers of all reasonable economic use of the Property." *Beyer I* at 934, citing *Collins v. Monroe County,* 999 So.2d 709, 713 (Fla. 3d DCA 2008), (citing *Lucas v. So. Carolina Coastal Council,* 505 U.S. 1003, 1017 (1992))). In *Beyer II,* the Third DCA reiterated its determination in *Beyer I* that Petitioners' claim was for an as applied taking (". . . the statute of limitations did not bar the Beyers' claim for an as-applied, rather than a facial, taking"), and went on to state:

> "The City assigned the Beyers sixteen points under its Residential Rate of Growth Ordinance, having a value of $150,000. The award of ROGO points, coupled with the current recreational uses allowed on the property, reasonably meets the Beyers' economic expectations under these facts. Thus, under an "as applied" takings analysis, the Beyers were not deprived of all economically beneficial use of the property. *See Collins*, 999 So.2d at 716 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001))." *Beyer II* at 566-567.

Petitioner's reliance on *Keshbro* and *Bowen* to support the argument that the Third District's opinion expressly and directly conflicts with *Beyer II* is misplaced. In *Keshbro* and *Bowen,* this Court and the Second District Court of Appeal held that the temporary closure of the property owners' businesses by the city of Miami and city of St. Petersburg respectively, denied the property owners of **all** economically beneficial or productive use of their land during the closure. Therefore, both courts based their decisions on the specific facts of those cases in finding a per se categorical taking (emphasis added). Here, after conducting the

same fact-intensive analysis as in *Keshbro* and *Bowen*, the Third DCA determined legally and factually that the mere enactment of the 1996 Plan did not deprive the Beyers of all economic use of their Property. *Beyer II* at 565 ("The existence or extent of the Beyers' investment backed expectations to develop [the Property] is a fact-intensive question"). *See also Shands v. City of Marathon*, 999 So.2d 718, 723 (Fla 3d DCA 2008)[7], ("[i]f a landowner can obtain a variance, transferrable development rights, or ROGO allocation points, then there is no facial taking and the factors enunciated in *Penn Central* apply" (quoting *Lucas* at 1019-1020 n. 8)).[8] Therefore, *Beyer II* does not conflict with Florida case law regarding per se categorical takings, and this Court must deny Petitioner's request to invoke the Court's conflict jurisdiction.

III. THIS COURT SHOULD NOT INVOKE ITS DISCRETIONARY JURISDICTION SIMPLY BECAUSE THIS CASE INVOLVES THE ALLEGED TAKING OF PROPERTY WITHOUT FULL COMPENSATION

Petitioner's second point also presents no express and direct conflict with this Court's opinions or those of the District Courts of Appeal. Petitioner asserts the Third DCA misconstrued and misapplied *Penn Central*. Even if there were

[7] The *Shands* case is legally and factually virtually identical to this case.

[8] In *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 137 (1978), the Supreme Court addressed the treatment of TDR's granted to Penn Central, stating: "While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."

such a conflict, and there is not, the cases Petitioner cites do not supply a basis for this Court to invoke its discretionary jurisdiction. *See supra*, note 4.

Contrary to Petitioner's assertion, a property owner alleging a regulatory taking, whether a per se or an as applied claim, must present evidence and testimony – not just argument of counsel – of such a taking. In a per se taking claim, the evidence and testimony must demonstrate the regulation at issue has resulted in a deprivation of all economic use. *See Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1170-71 (Fla. 4th DCA 1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) ("facial takings challenges face an uphill battle"). In an as applied takings claim - as is the case here - the First District Court of Appeal held that "[i]t is incumbent on the landowner to demonstrate [through evidence and testimony] that he has been denied all or a substantial portion of the beneficial uses of his property." *Glisson v. Alachua County*, 558 So.2d 1030, 1037 (Fla. 1st DCA 1990). Another First DCA decision, *State, Dep't of Envtl. Prot. v. Burgess*, 772 So.2d 540, 544 (Fla. 1st DCA 2000), is instructive with respect to the Beyers' evidentiary burden before the trial court. In *Burgess*, the First DCA held:

> "[i]n considering whether the [FDEP] permit denial deprived Burgess of all economically beneficial use of his property, the trial court must weigh evidence relating to numerous issues, including Burgess's knowledge and expectations when he purchased the property and whether all feasible economic use has been denied . . ."

In *Beyer II*, the appellate court - citing to *Penn Central*[9] - pointedly stated in regard to the Beyers' evidentiary burden at the trial court level: "[t]he record is devoid of evidence that — not only at the time of purchase but in all the intervening years — the Beyers pursued any plans to improve or develop the property. They provided no evidence of investment-backed expectations at or since the time the property was purchased, nor demonstrated any reasonable expectation of selling the property for development." *Beyer II* at 565-566. Accordingly, the factual determinations and legal conclusion made by the appellate court in *Beyer II* do not misconstrue or misapply federal or state case law regarding as applied takings warranting the invocation of this Court's conflict jurisdiction under Article V, § 3(b)(3), *Fla. Const.*

IV. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH CASELAW REGARDING THE "TIPSY COACHMAN" RULE

In *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644–45 (Fla. 1999), this Court explained the "Tipsy Coachmen" rule in detail:

> [E]ven though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling. In *In re Estate of Yohn*, this Court stated: It is elementary that the theories or reasons assigned by

[9] "The existence or extent of the Beyers' investment backed expectations to develop [the Property] is a fact-intensive question. . . . [c]onsidering the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action; **diminution in the property value alone cannot establish a taking**" (emphasis added). *Beyer II* at 565-566.

> the lower court as its basis for the order or judgment appealed from, although sometimes helpful, are not in any way controlling on appeal and the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefore. 238 So.2d 290, 295 (Fla. 1970). Stated another way, if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.

The basis for the appellate court's affirmance of the trial court in *Beyer II* is clearly in the record. The Hearing Officer found the camping use in conjunction with the $150,000 value of the ROGO points assigned to the Property constituted a reasonable economic use for the Property and, further, that such use satisfied the Beyer's reasonable investment backed expectations. These facts and conclusions were in the record and presented to the trial court on remand of *Beyer I*. The identical conclusion by the appellate court fully comports with the Tipsy Coachman rule. *See Beyer II* at 565-566. There being no express and direct conflict, this Court lacks jurisdiction under Article V, § 3(b)(3), *Fla. Const.*

V. CONCLUSION

Petitioner has failed to demonstrate a direct and express conflict between the Third District's decision and a decision of this Court or a decision of another district court of appeal. Consequently, conflict jurisdiction does not exist, and Respondents City of Marathon and State of Florida respectfully urge the Court to deny the Petition.

Respectfully submitted this 5th Day of December. 2016.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure and the foregoing brief is Times New Roman, fourteen point, proportionately spaced.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing document has been electronically filed with the Clerk of the Florida Supreme Court using the E-Filing Portal on this 5th day of December, 2016, and being served via e-mail to the following:

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