International Municipal Lawyers Association

Advancing Excellence in the practice of Local Government Law

Concurrent Afternoon Session

Koontz, Harvey Cedars, and *Lost Tree*

Monday, September 30, 2013

2:15-3:25 PM

3:30-4:30 PM



Robert N. Thomas

Damon Key Leong Kupchak Hastert
Honolulu, Hawaii



Cecily T. Barclay

Perkins Coie
San Francisco, California



Dwight H. Merriam

Robinson & Cole LLP
Hartford, Connecticut

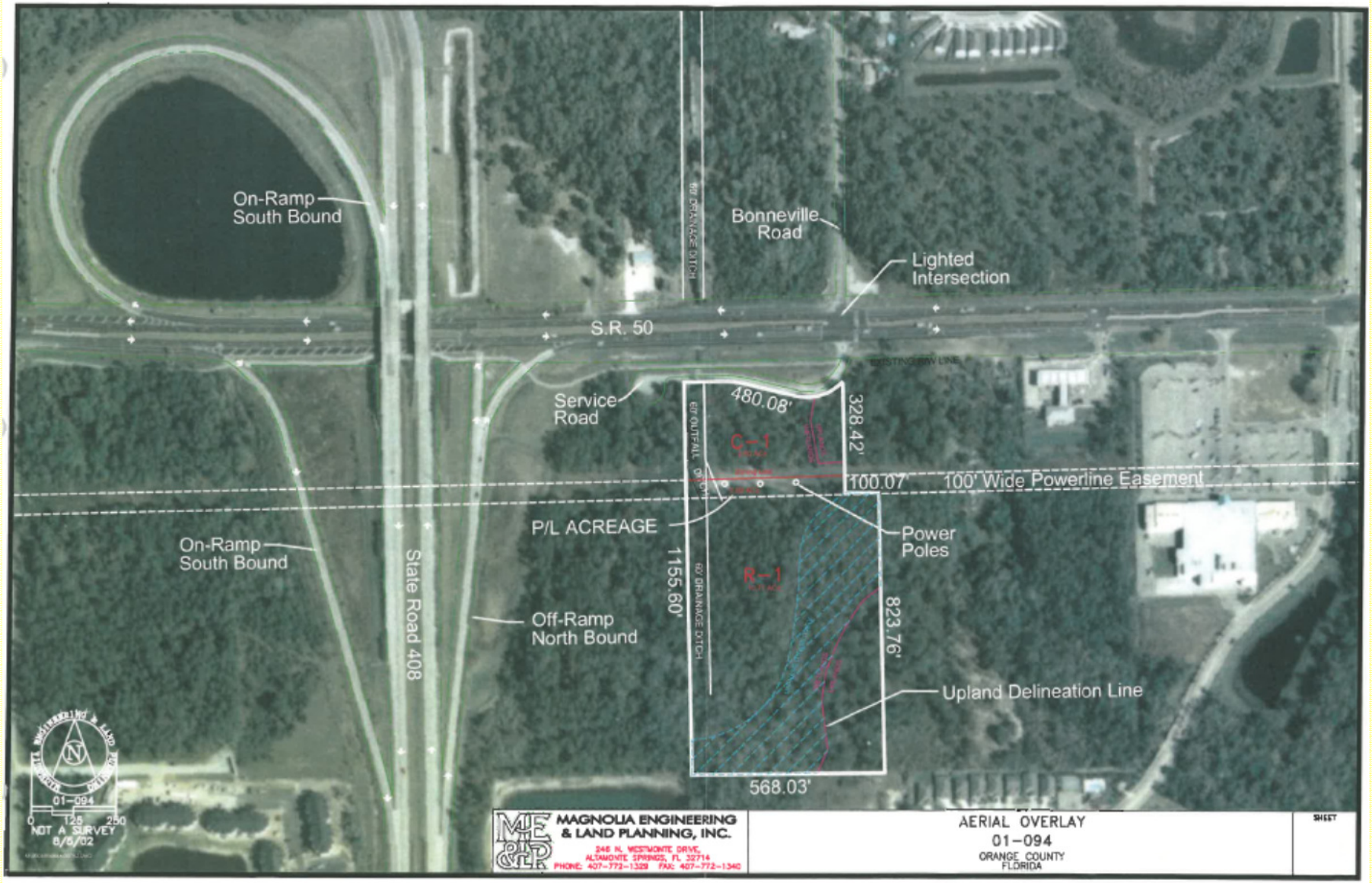


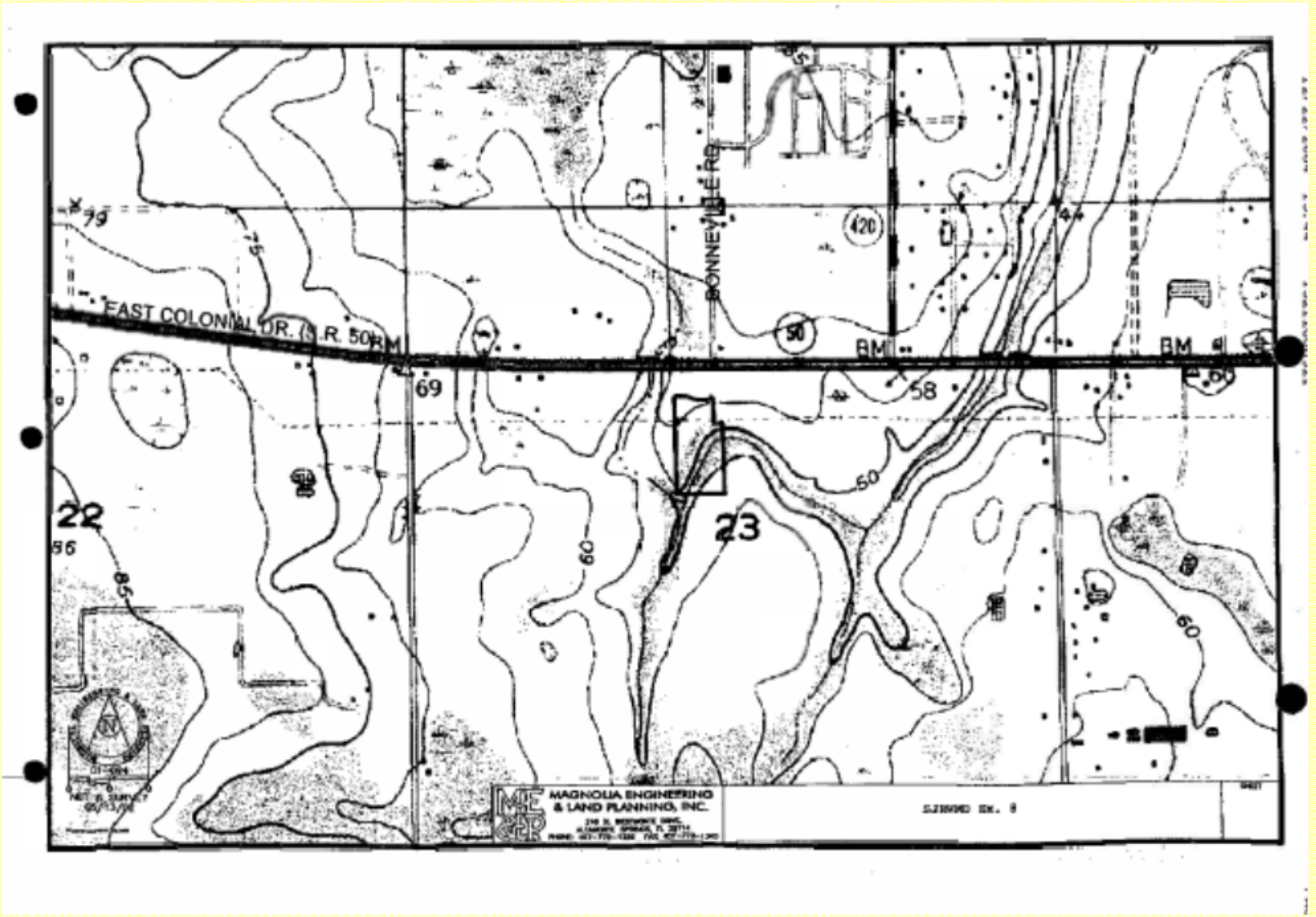
Koontz v. St. Johns Water Management District

(U.S. 2013)

The Story


The
St. Johns River
Water
Management
District
GEORGIA
NASSAU
Fernandina Beach
BAKER
DUVAL
Jacksonville
Macclenny
CLAY
Green Cove Springs
BRADFORD
ST. JOHNS
St. Augustine
Gainesville
ALACHUA
Palatka
PUTNAM
FLAGLER
Bunnell
MARION
Ocala
Daytona Beach
DeLand
VOLUSIA
LAKE
Leesburg
Sanford
SEMINOLE
Titusville
Orlando
ORANGE
BREVARD
Melbourne
OSCEOLA
INDIAN RIVER
Vero Beach
OKEECHOBEE
Atlantic Ocean
N


On-Ramp
South Bound
Bonneville
Road
Lighted
Intersection
S.R. 50
Service
Road
480.08'
328.42'
C-1
100.07'
100' Wide Powerline Easement
P/L ACREAGE
Power
Poles
On-Ramp
South Bound
State Road 408
Off-Ramp
North Bound
1155.60'
R-1
823.76'
Upland Delineation Line
568.03'
01-094
0 125 250
NOT A SURVEY
6/6/02
MAGNOLIA ENGINEERING
& LAND PLANNING, INC.
AERIAL OVERLAY
01-094
ORANGE COUNTY
FLORIDA
SHEET


EAST COLONIAL DR. (S.R. 50)
BONNEVILLE RD
BM
BM
BM
22
23
69
58
50
60
60
60
420
50
MAGNOLIA ENGINEERING
& LAND PLANNING, INC.

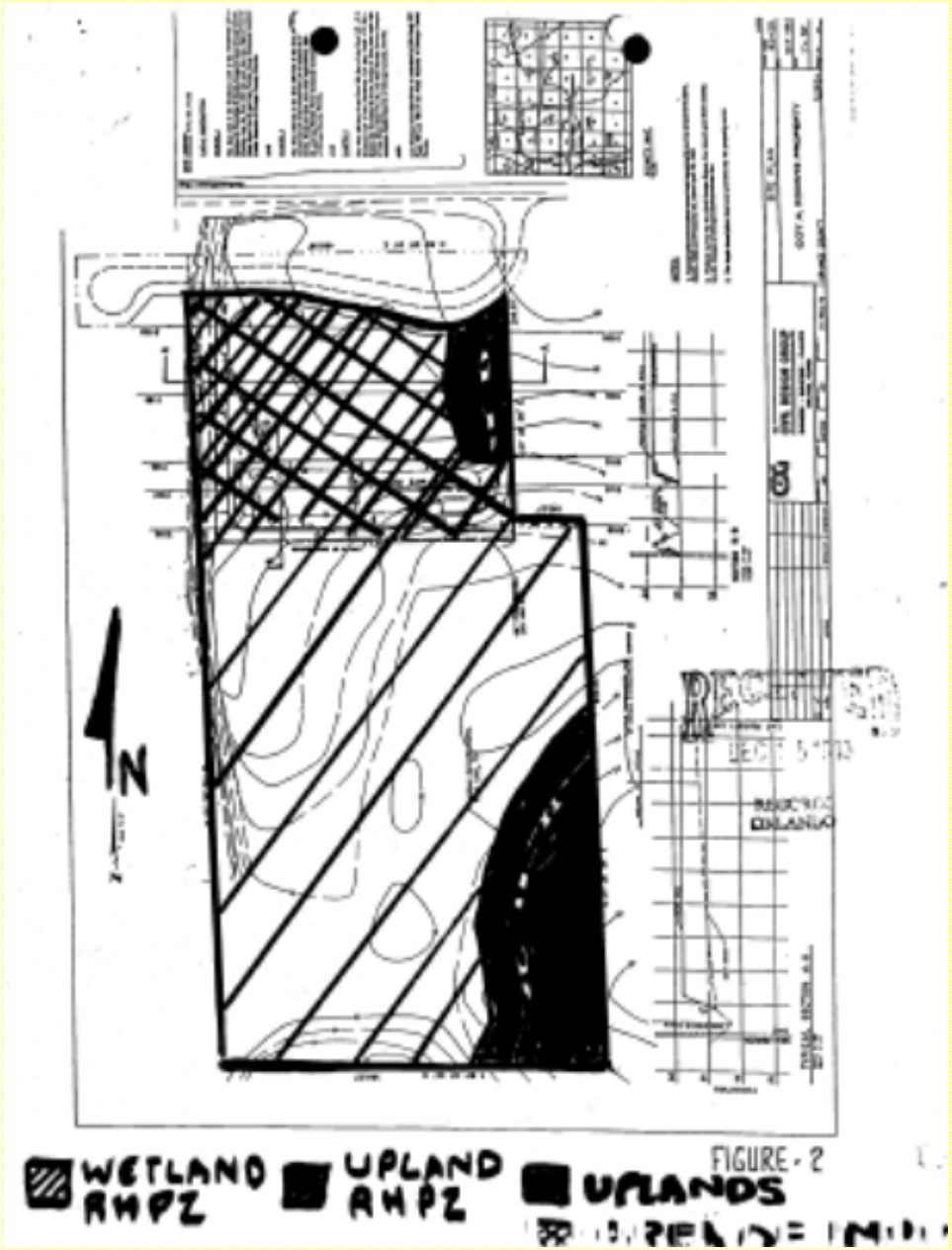
Describe, in general terms, the proposed project, system or activity.

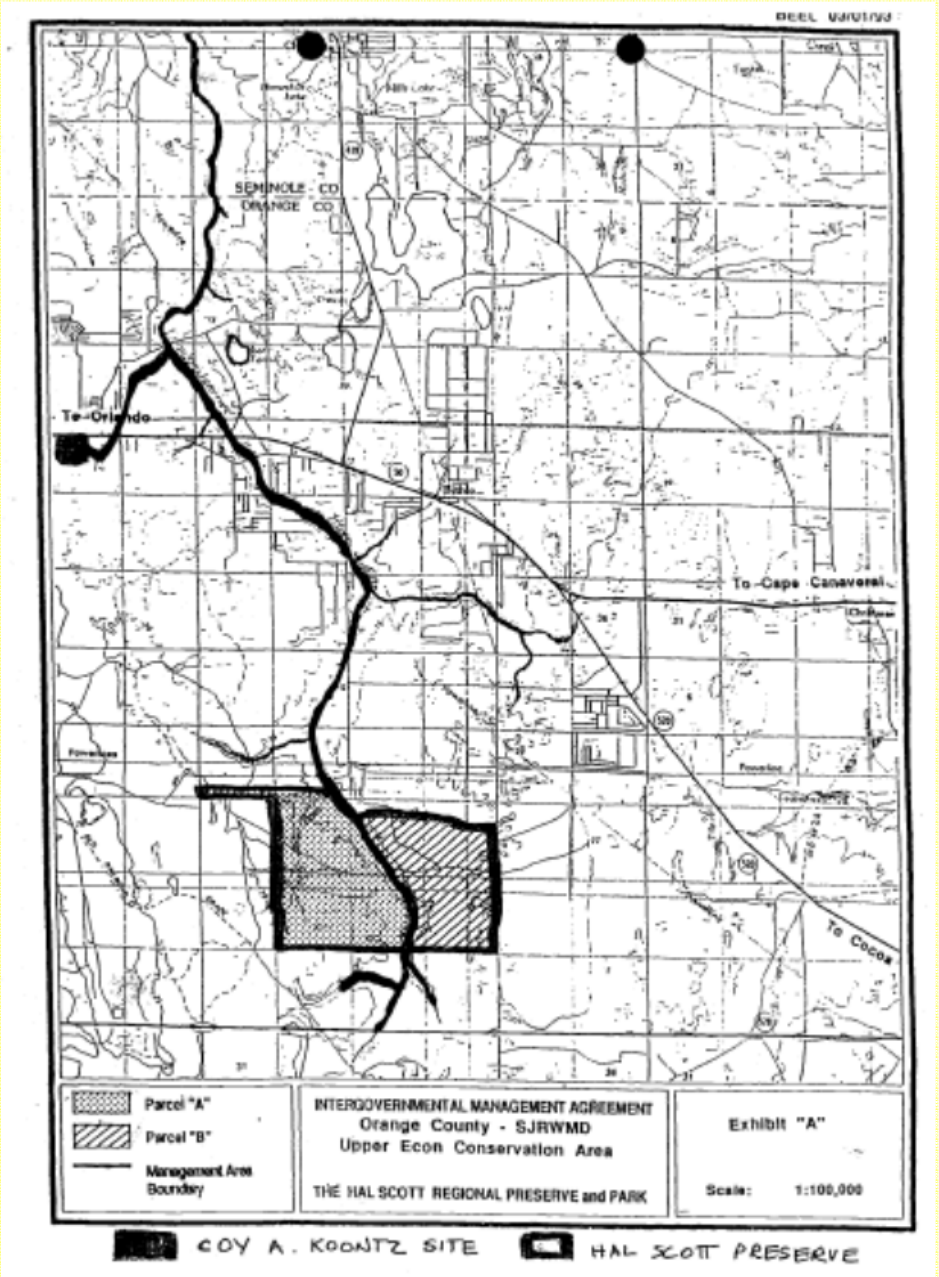
Fill 3.75 Acres of 14.21 Acre site to reclaim the 3.75 Acres for commercial development. THE Remaining 10.46 Acres to be placed in conservation easement. 0.80 Acres of wetland impact.

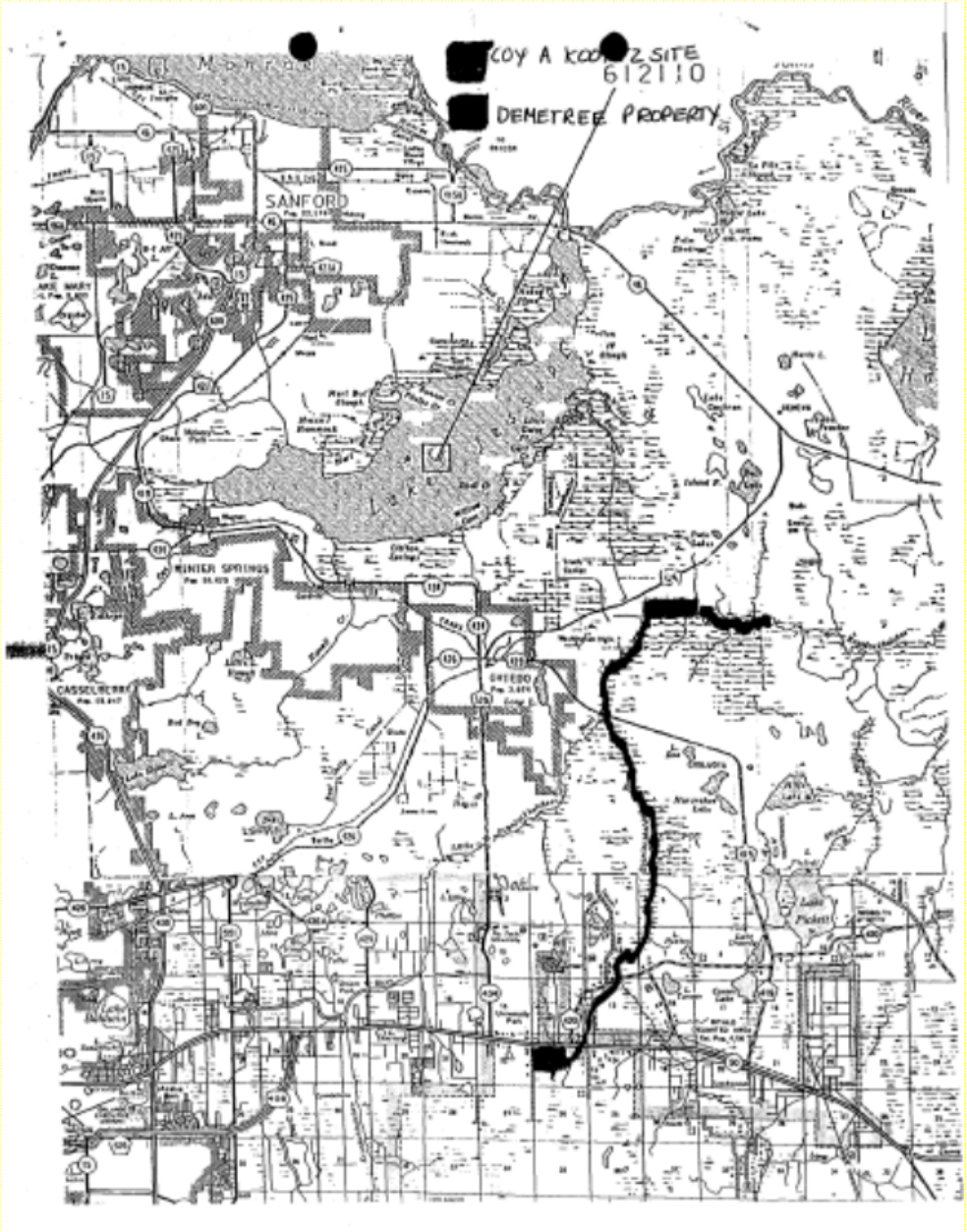
I hereby designate and authorize the agent listed above to act on my behalf, or on behalf of my corporation, as the agent in the processing of this application for the permit and/or proprietary authorization indicated above; and to furnish, on request, supplemental information in support of the application. In addition, I designate and authorize the above-listed agent to bind me, or my corporation, to perform any requirement which may be necessary to procure the permit or authorization indicated above. I understand that knowingly making any false statement or representation in this application is a violation of Section 373.430, F.S., and 18 U.S.C. Section 1001.

COY KOONTZ, Jr. — 9/19/04

Typed/Printed Name of Applicant | Signature of Applicant | Date


N
WETLAND RHPZ
UPLAND RHPZ
UPLANDS
FIGURE - 2


SEMINOLE CO
ORANGE CO
To Orlando
To Cape Canaveral
To Cocoa
Parcel "A"
Parcel "B"
Management Area Boundary
INTERGOVERNMENTAL MANAGEMENT AGREEMENT
Orange County - SJRWMD
Upper Econ Conservation Area
THE HAL SCOTT REGIONAL PRESERVE and PARK
Exhibit "A"
Scale: 1:100,000
COY A. KOONTZ SITE
HAL SCOTT PRESERVE


COY A KOPPERS SITE
612110
DEMETREE PROPERTY
SANFORD
WINTER SPRINGS
CASSELBERRY
OVIEDO

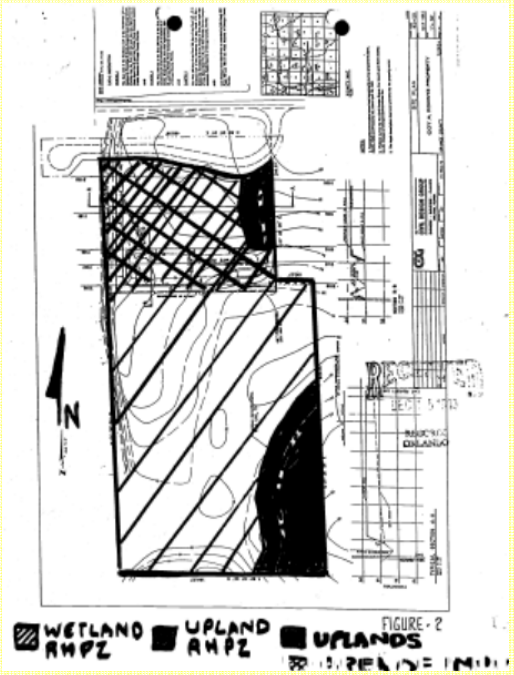
- **Undeveloped 14.9 acres east of Orlando**
- **Near major highway**
- **Drainage ditch, high voltage lines**
- **Largely classified as wetlands**



- **Management and Storage of Surface Water (MSSW) Permit**
- **Wetlands Resource Management (WRM) Permit**

Koontz offered…

- …Conservation easement on 11 acres

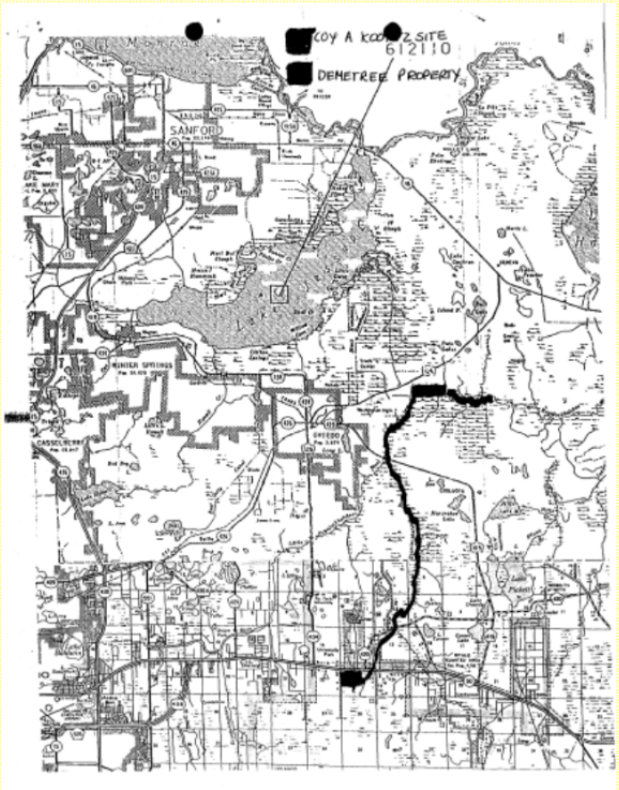


WMD counteroffers…

- Reduce development to 1 acre
- Give easement on remaining 13.9 acres

•Alternatively…

- Develop 3.7 acres
- Make improvements
  - several miles away;
  - no particular project



Koontz responds

- **Refuses counteroffers**
- **Sues in state court**

The Decisions in Florida

- Circuit Court (trial court)
- Florida District Court of Appeal for the Fifth Circuit
- Remand to the Circuit Court
- Florida Supreme Court

No. 11-1447

In The
Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

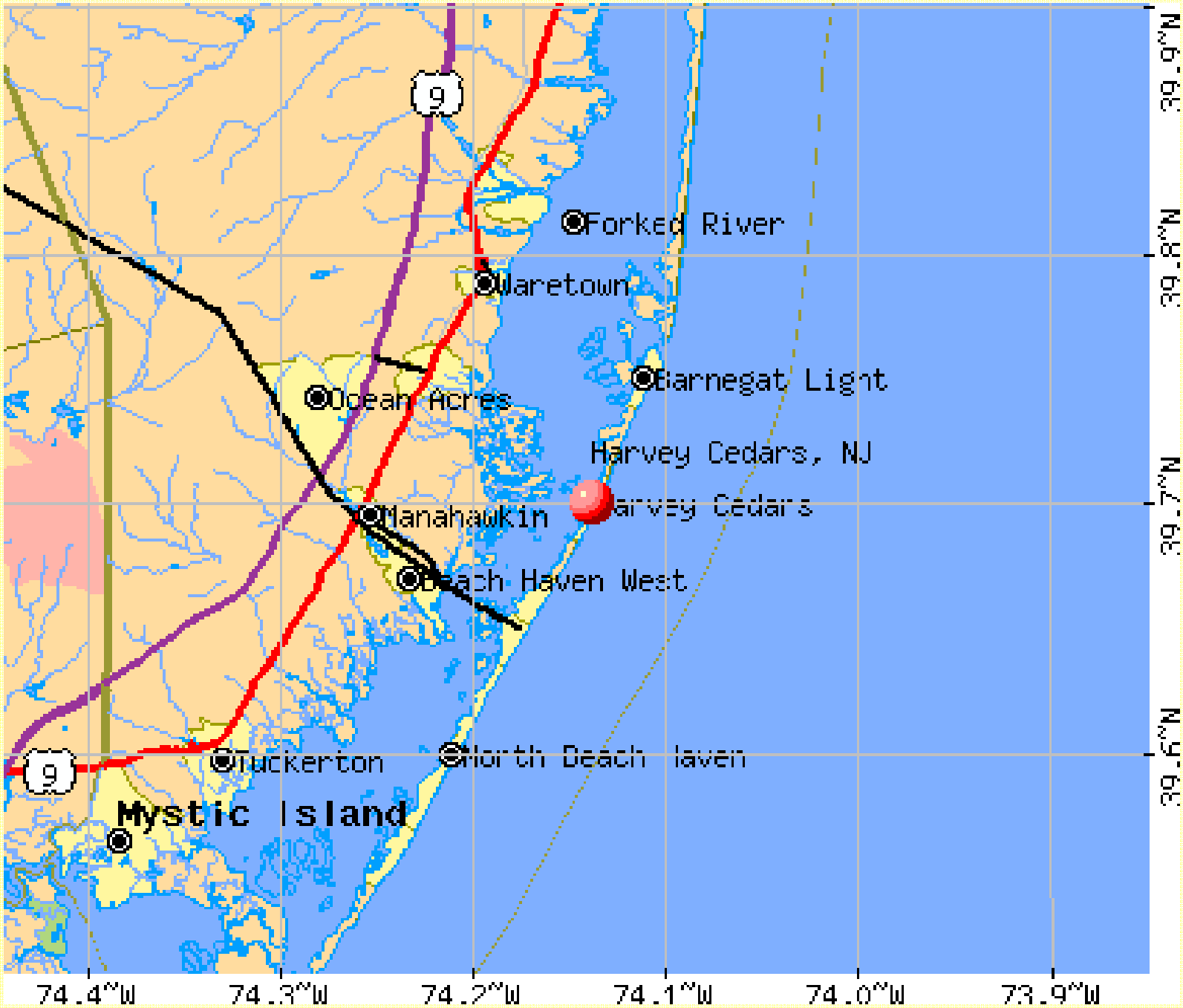
ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,
Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Florida

BRIEF OF THE AMERICAN PLANNING ASSOCIATION, THE CITY OF NEW YORK, AND THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Borough of Harvey Cedars v. Karan

(N.J. 2013)


9
Forked River
Waretown
Barnegat Light
Ocean Acres
Harvey Cedars, NJ
Harvey Cedars
Manahawkin
Beach Haven West
Tuckerton
North Beach Haven
9
Mystic Island
39.9°N
39.8°N
39.7°N
39.6°N
74.4°W
74.3°W
74.2°W
74.1°W
74.0°W
73.9°W


Harvey Cedars, NJ







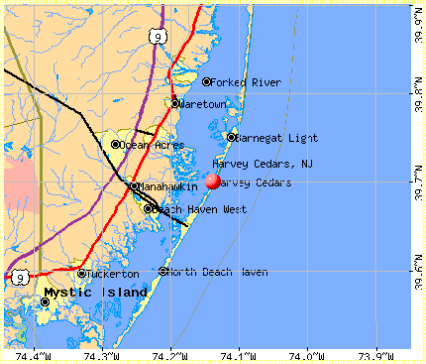




Dune Replenishment and Partial Takings



The Facts



- **$2M oceanfront home on Long Beach Island**
- **Borough condemns a "dune easement" over more than 25% of Karans' property to allow US Army Corps of Engineers to construct a 22-foot high dune on the property**
- **Borough offers $300 for easement; contends damages are "*de minimus*"**
- **Owner's appraiser: loss of views cause $500,000 of damages**

- **Owner moves *in limine* to bar Borough appraisal which contends that taking creates "special benefits" via storm protection provided by dune**
- **Evidence excluded by trial court as "general benefit"**
- **Jury awards $375,000 in damages**
- **Trial court ruling affirmed and jury award upheld by Appellate Division (published decision)**



The Setting

- **Supreme Court grants certification before Superstorm Sandy**
- **Superstorm Sandy causes catastrophic property losses**



- **Areas with engineered dunes fare much better than those without**
- **Dune/storm replenishment efforts are renewed in earnest along shorelines**



- **Public perception and media portrayal paints "holdout" oceanfront property owners as greedy, selfish, obstructionists**
- **Increasing political pressure mounted at local and state levels, subjecting owners to ridicule and shame**
- ***Amicus curiae* status granted to State of New Jersey and other interest groups**
- **Arguments held May, 2013**

The Decision

- General-benefits doctrine is "at odds with contemporary principles of just-compensation jurisprudence"
- Jury only permitted to hear "one side" of the story
- Could result in a "windfall" to property owners at public expense



- **Just compensation in partial taking must be based upon a consideration of "all relevant, reasonably calculable, and non-conjectural factors" that either decrease or increase the value of the remaining property**
- **Court recognizes that the loss of view is compensable, but requires rehearing permitting evidence regarding the impact of the storm protection benefits upon the value of the property as an offset to damages**

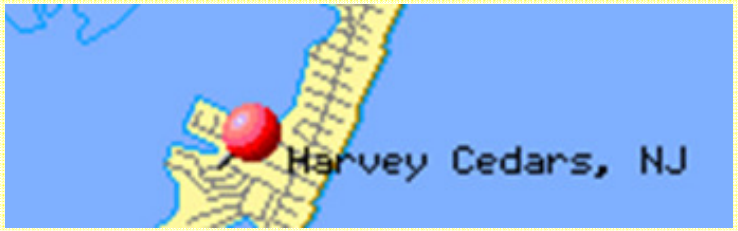


The Implications



:

- **Shore communities rejoice!**
- **Will *Karan* cause holdouts to change course and donate their properties?**
- **Will *Karan* cause, or has it caused, shore communities to accelerate efforts to obtain easements, voluntarily or via eminent domain, before this year's hurricane season is in full-swing?**



- **What impacts will or may it have on just compensation determinations, from the condemnor's offers to the commissioners' awards and jury awards that result?**
- **Related issues: loss of access, loss of private beach under public trust doctrine, ambiguity in description of rights obtained**
- **Funding implications and realities**

Additional Implications

- **Does *Karan* impact the two traditional methods of valuing partial takings?**
  - **Before and After method: Value of entire parcel before taking – value of remainder after taking = just compensation**
  - **Per Se method: Value of part taken + diminution in value (or damages) to remainder = just compensation**





- **Does the *Karan* impact the duty of the condemnor and the owner to mitigate damages?**
- **What remains of the "project influence" doctrine? Shield or sword?**
- **What type(s) of evidence will be offered, and what will be deemed admissible?**

Lost Tree Village Corp. v. United States

(Fed. Cir. 2013)





Private. Privileged. Paradise.








© John's Island Real Estate Company
W
S
N
E
Indian River
Gem Island
John's Island Sound
Key
Club Facilities
Single Family Residences
Golf Cottages
Oceanside Village Homes
South Beach Villas
Pagot Court
Condominiums
Townhouses
North and South Village
Cottages, Maisonettes,
Mid-rise Houses
Security Gatehouses
State Road A1A
Atlantic Ocean
John's Island Real Estate Company
Sales & Rental, Club Administration
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Sister Islands
Pine Island
Indian River
Gem Island
John's Island Sound
Atlantic Ocean
TVCOS0003





161 TERRAPIN POINT
Offered at: $9,600,000
Bedrooms: 5
Baths: 8 full + 1 half
Approx. Sq. Ft.: 8,000
Lot Size: 1.48 Acres



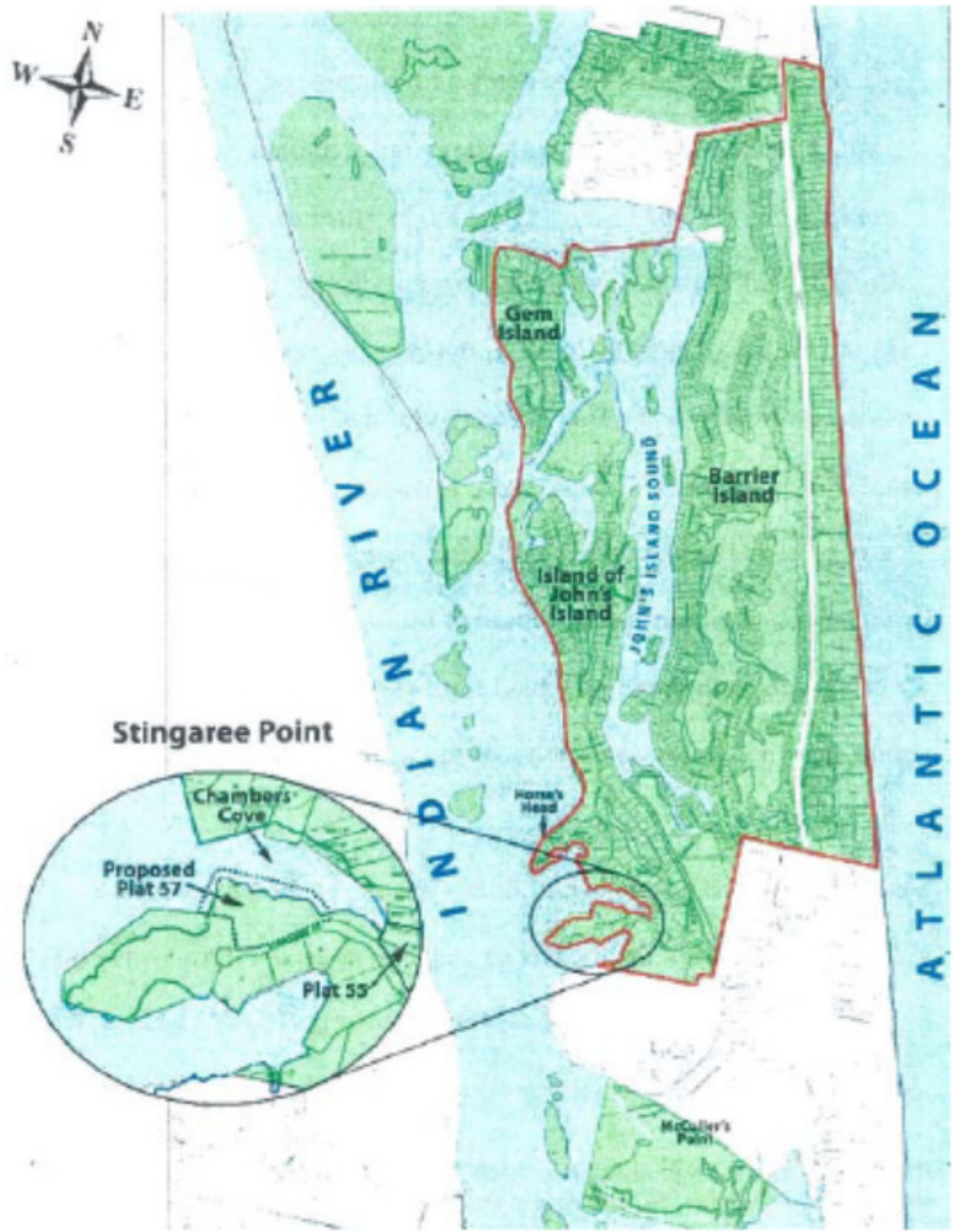
120 SOUTH SHORE CIRCLE
Offered at: $7,200,000
Bedrooms: 4
Baths: 5 full + 2 half
Approx. Sq. Ft.: 11,800
Lot Size: 0.93 Acres

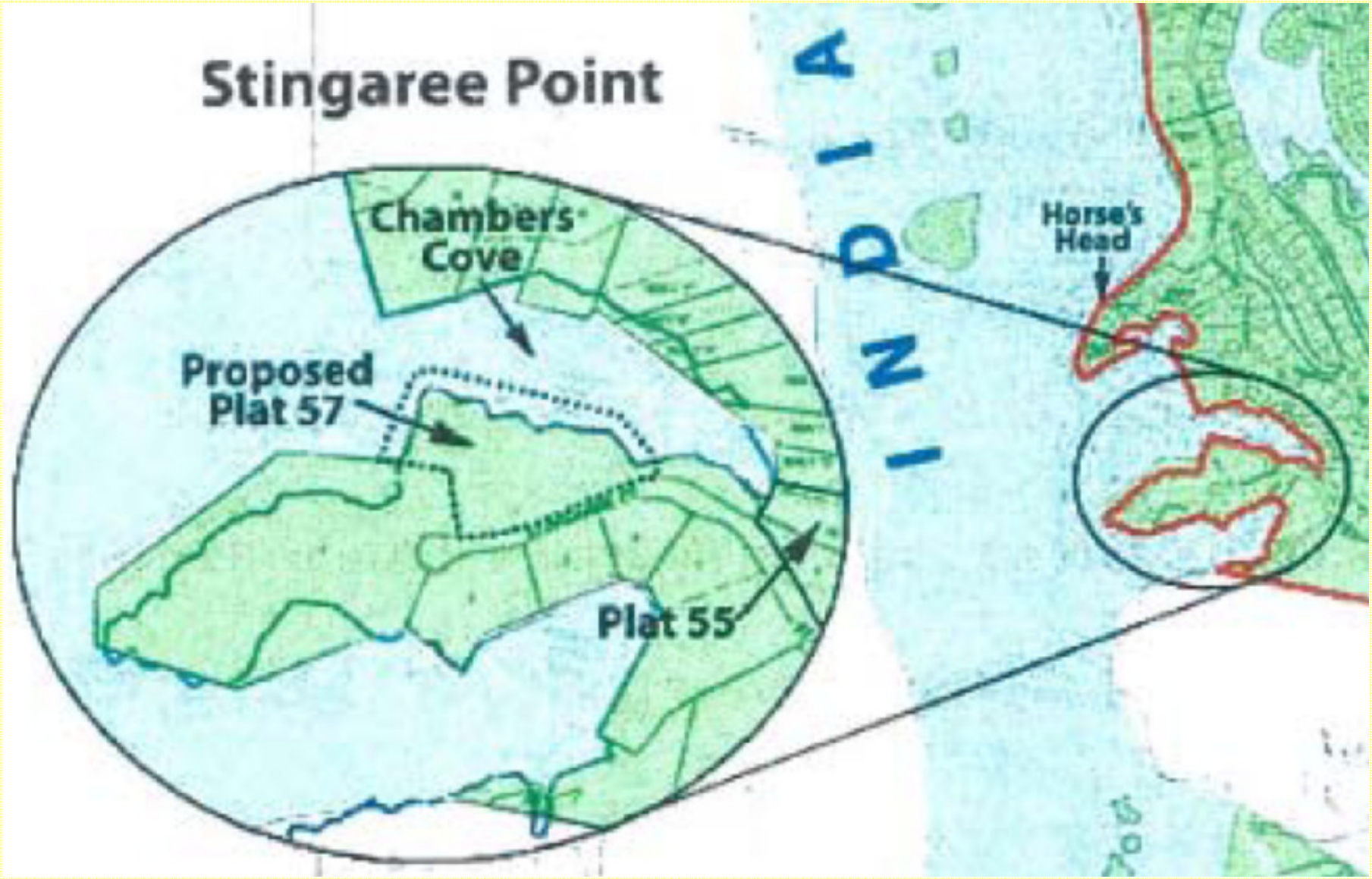


620 COCONUT PALM ROAD
Offered at: $5,250,000
Bedrooms: 6
Baths: 7 full + 1 half
Approx. Sq. Ft.: 8,142
Lot Size: 0.86 Acres



Stinagaree Point showing Plat 57


N
W
E
S
Gem Island
Barrier Island
Island of John's Island
JOHN'S ISLAND SOUND
INDIAN RIVER
ATLANTIC OCEAN
Stingaree Point
Chambers Cove
Proposed Plat 57
Plat 55
Horse's Head
McCullen's Point


Stingaree Point
Chambers Cove
Proposed Plat 57
Plat 55
Horse's Head
D I A N I

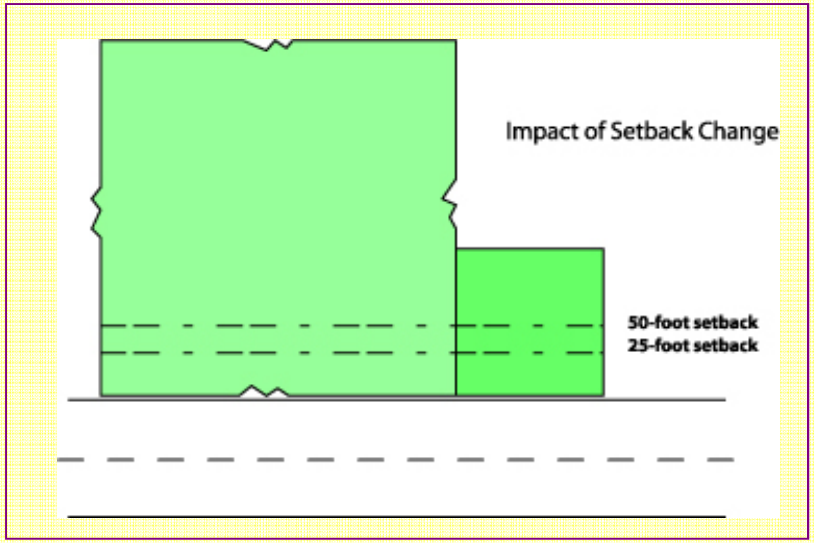
First Questions

- **Is it "Property"?**
- **What was taken?**
  - **The numerator**
- **What is the total property subject to the takings analysis?**
  - **The denominator**

What is the Analysis?

- **Penn Central three part**
  - **Diminution in value**
  - **Investment-backed expectations**
  - **Character of the government's action**
    - **Public good weighed against private burden**
  - ***Palazzolo* and *Tahoe-Sierra* reinforce this**

Let's Take a Quick Look at the Interplay between the Numerator and the Denominator



- **100 ac. v. 10,000 sq.ft.**
- **50,000 v. 2,500 sq.ft.**
- **1.25% v. 25% (20x)**
- ***Penn Central***
  - **Diminution**
  - **IBE**
  - **Character**

Several Names

- Numerator-denominator
- Or just the denominator problem
- Takings fraction
- Relevant parcel
- Parcel as a whole
- Nonsegmentation
- Nonseverance

Is It an Issue for the Courts?

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

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130-131, 98 S.Ct. 2646 (1978). Justice Rehnquist argued for a contrary result in dissent. *See id.* At 112 n.13 (Rehnquist, J., dissenting).

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements. . .

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17 n.7.

To the extent that any portion of the property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

Concrete Pipe*, Id.* At 644.

[Petitioner's] contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole; but we have at times expressed discomfort with the logic of this rule …

Palazzolo v. Rhode Island, 533 U.S. 606, 616, 121 S.Ct. 2448 (2001), *citing* ***Keystone Bituminous Coal Assn. v. DeBenedictis***, 480 U.S. 470, at 497, 107 S.Ct. 1232 (1987).

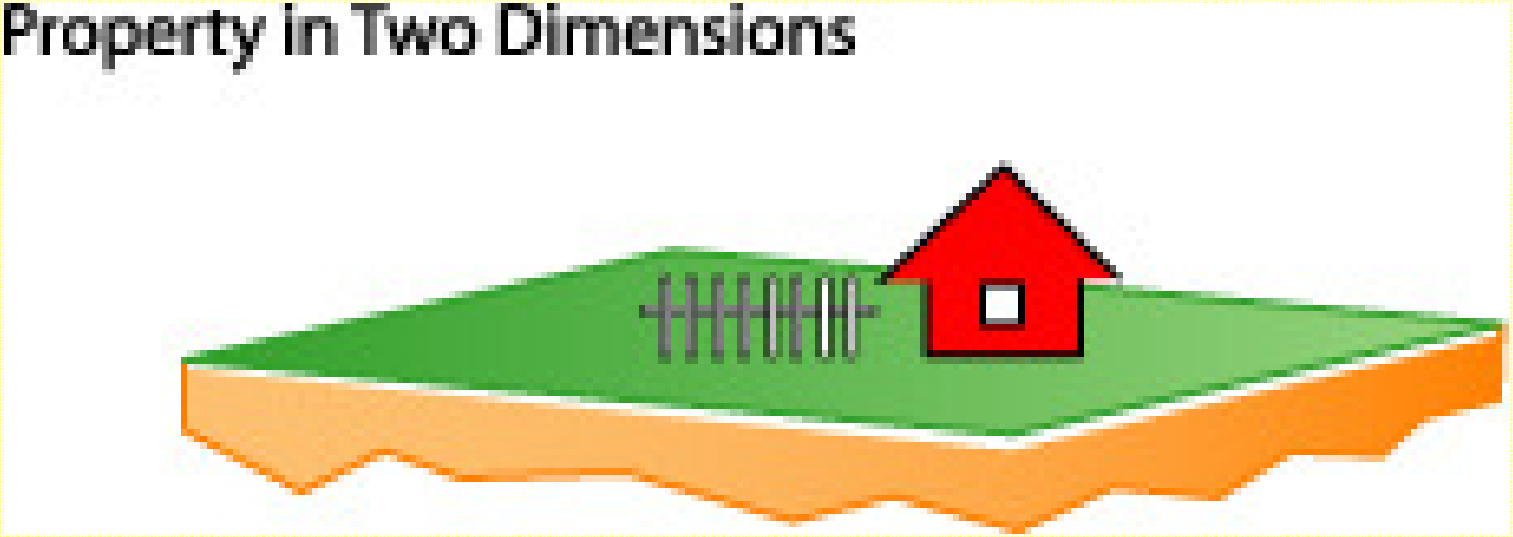
Central to the Multi-Factor Analysis of *Penn Central*

Essential to Proportionality and Fairness

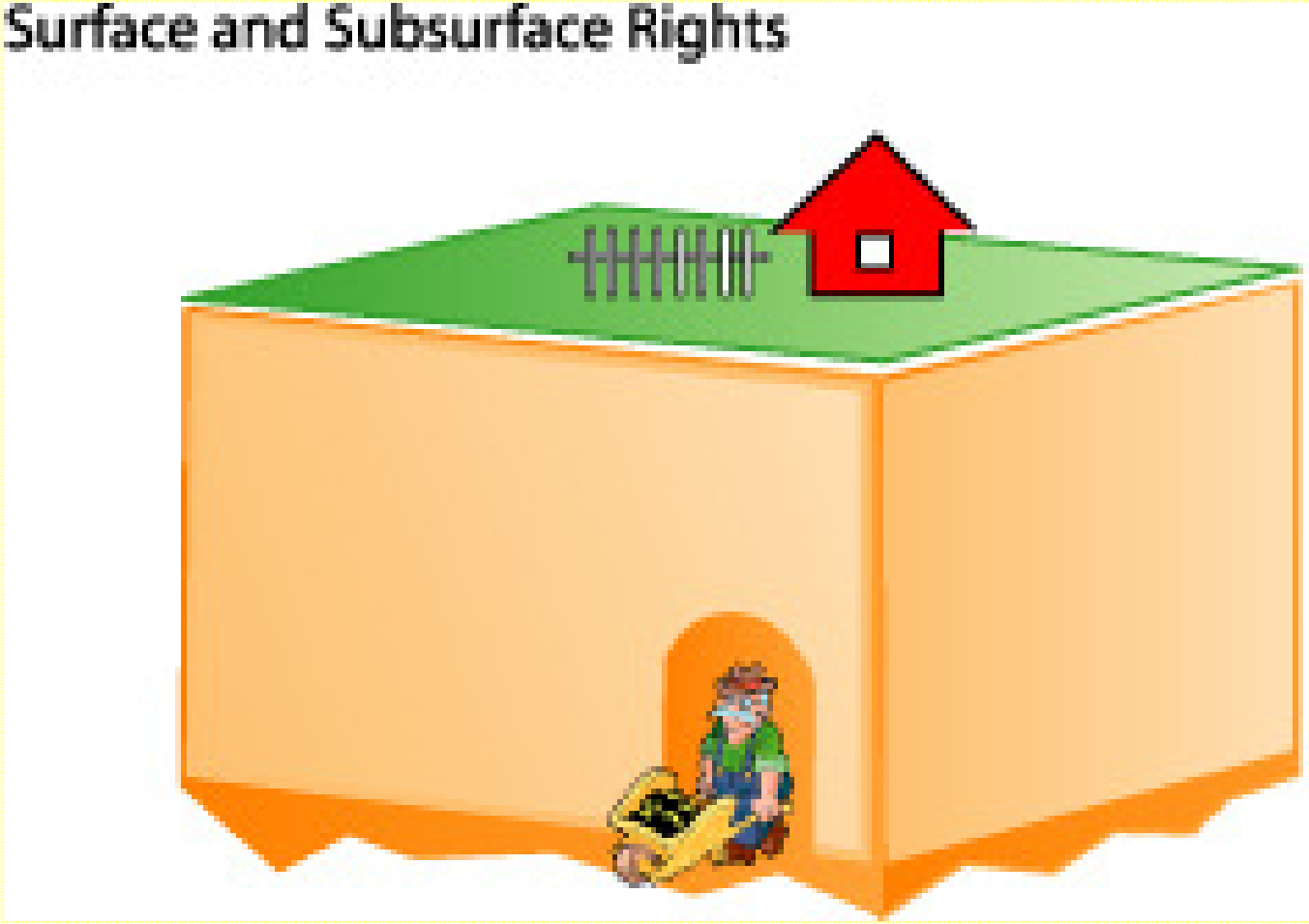
Must Know How Property Can Be Sliced and Diced

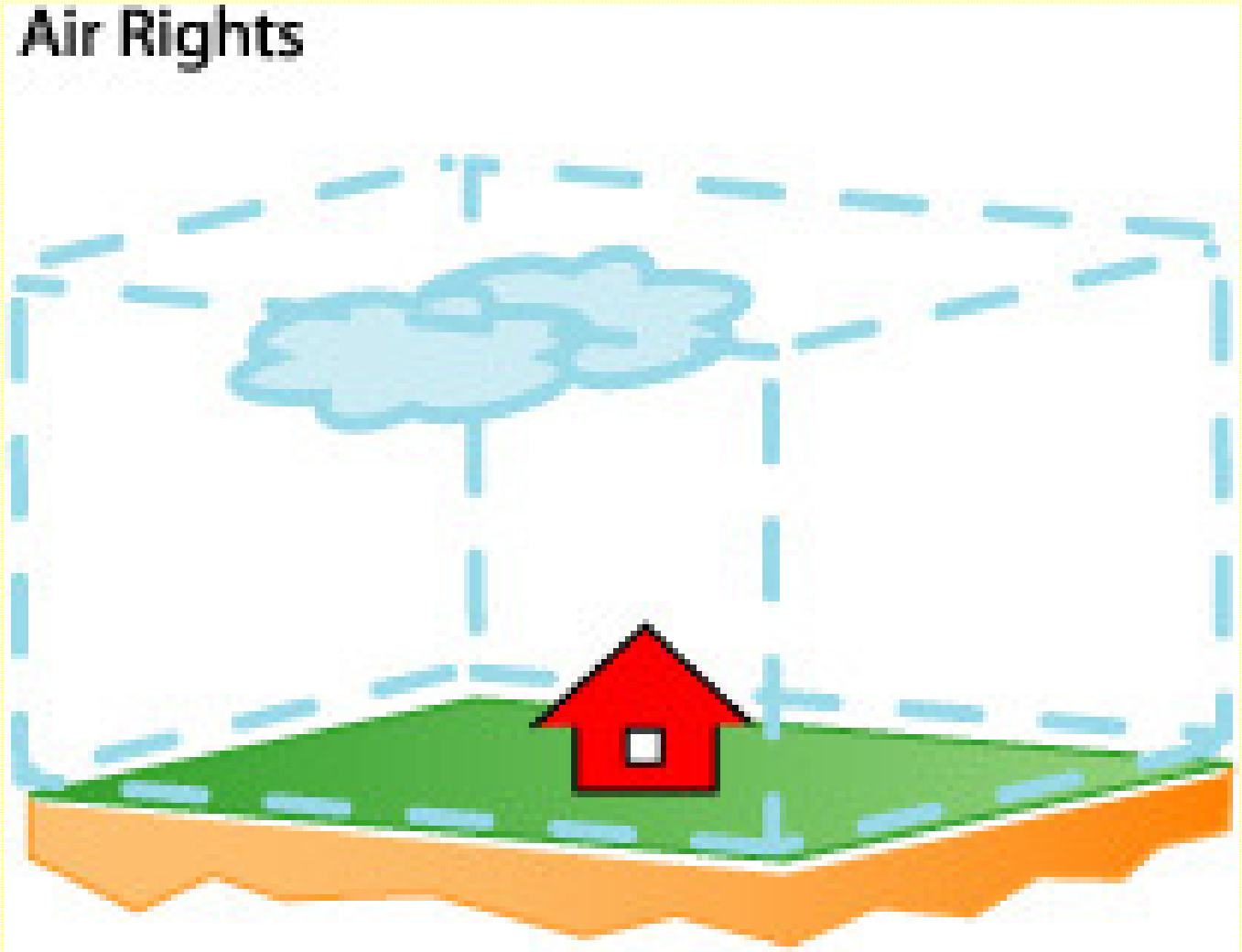
Find a Set of Rules by Which the Relevant Parcel May Be Determined

Property in Two Dimensions

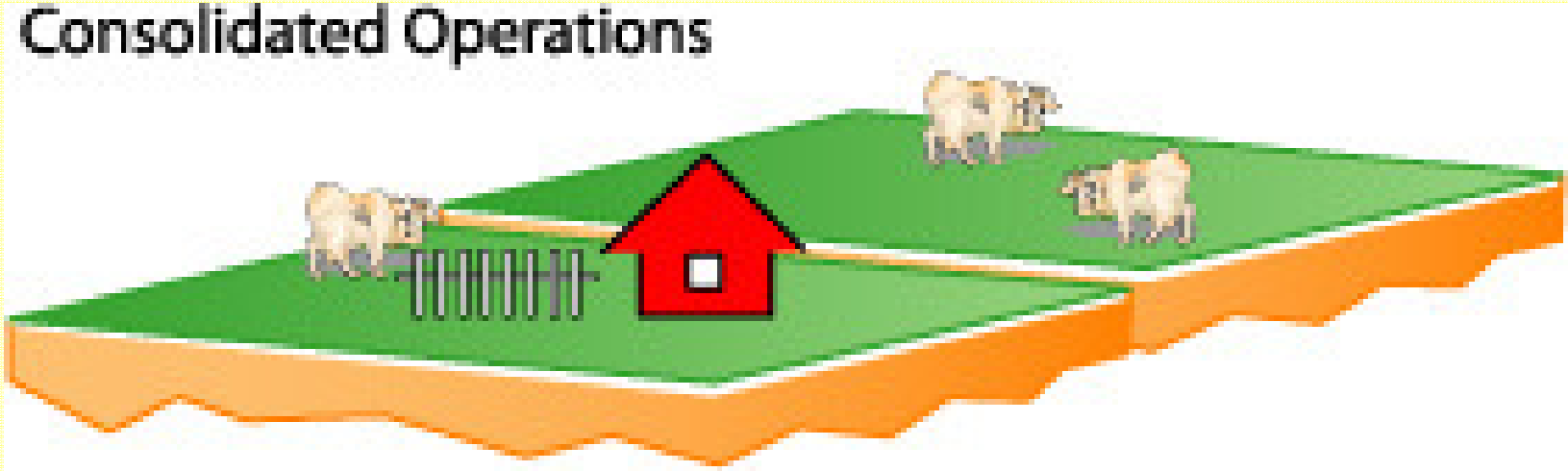


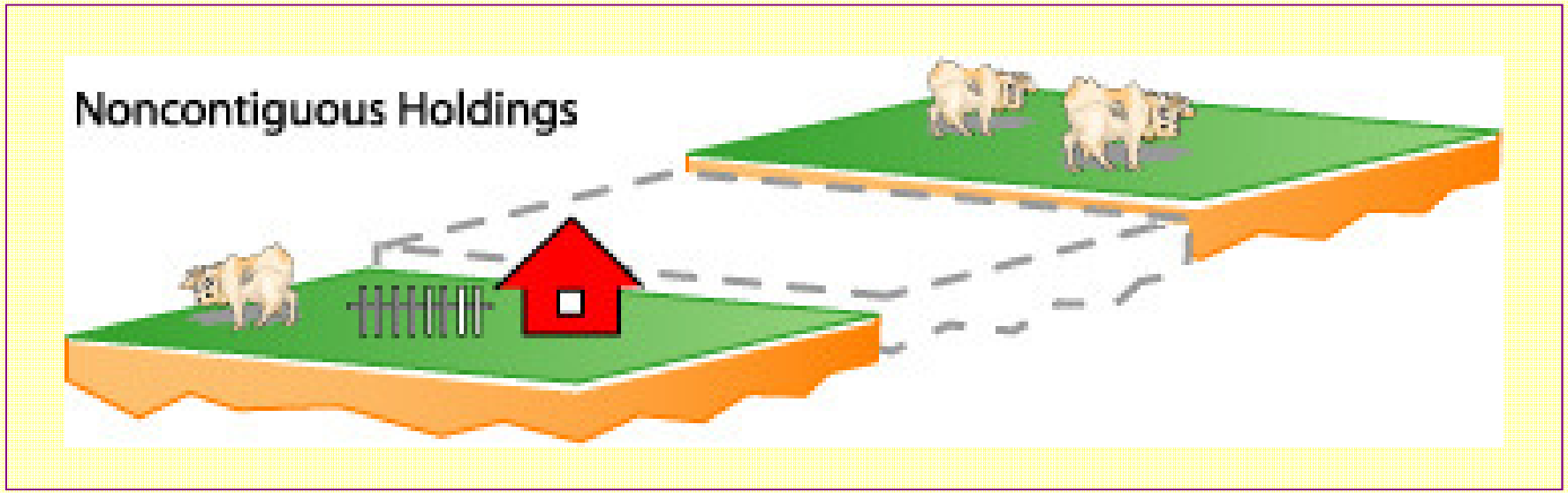
Surface and Subsurface Rights



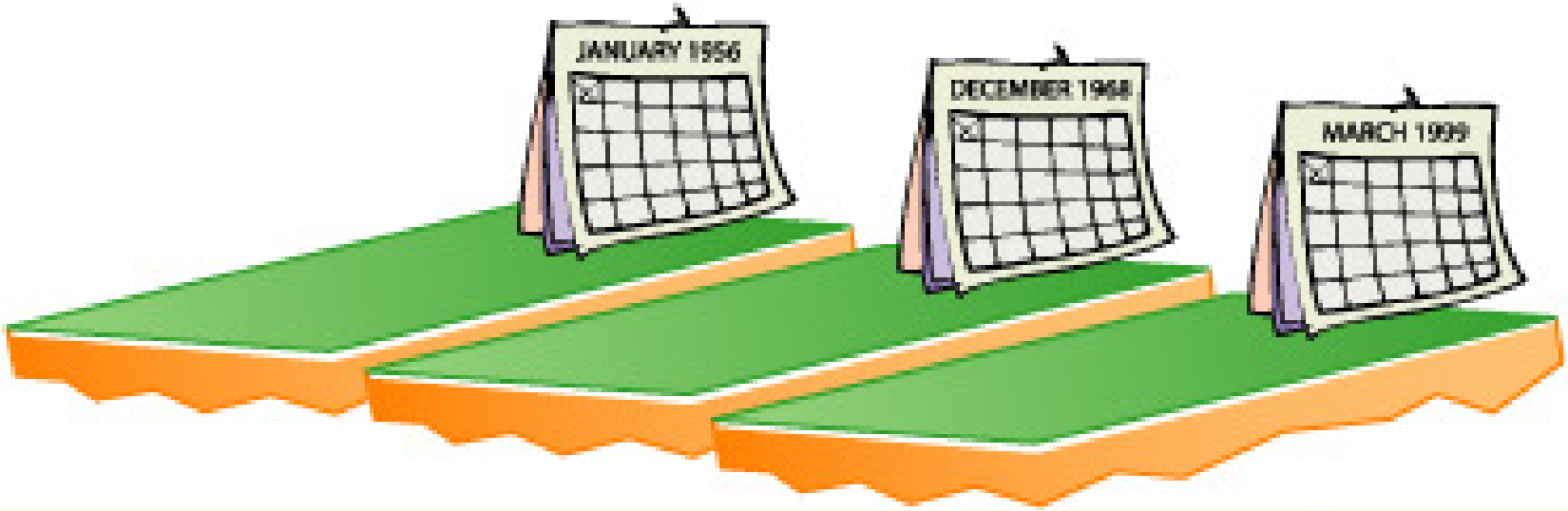

Air Rights

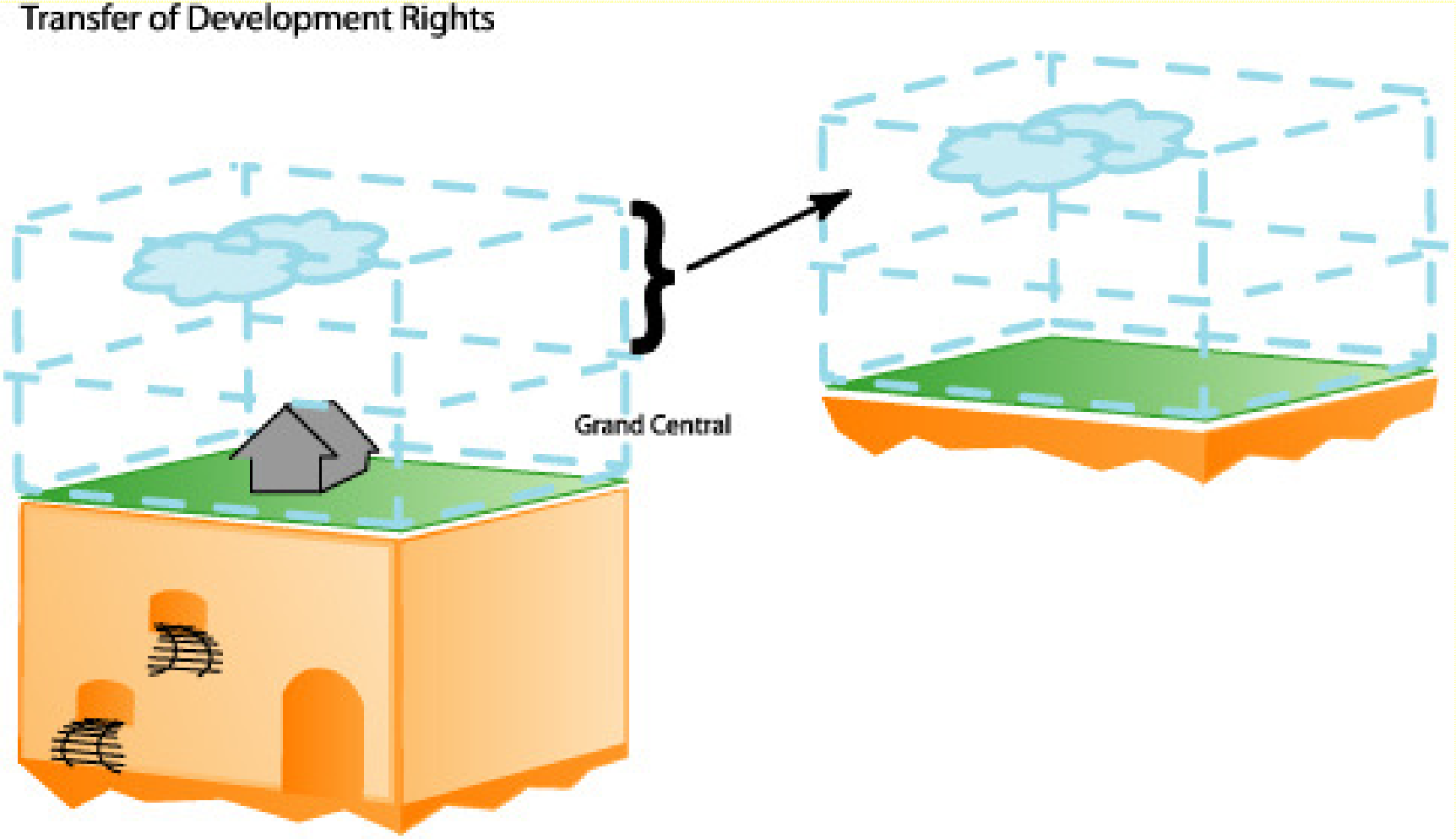
Consolidated Operations



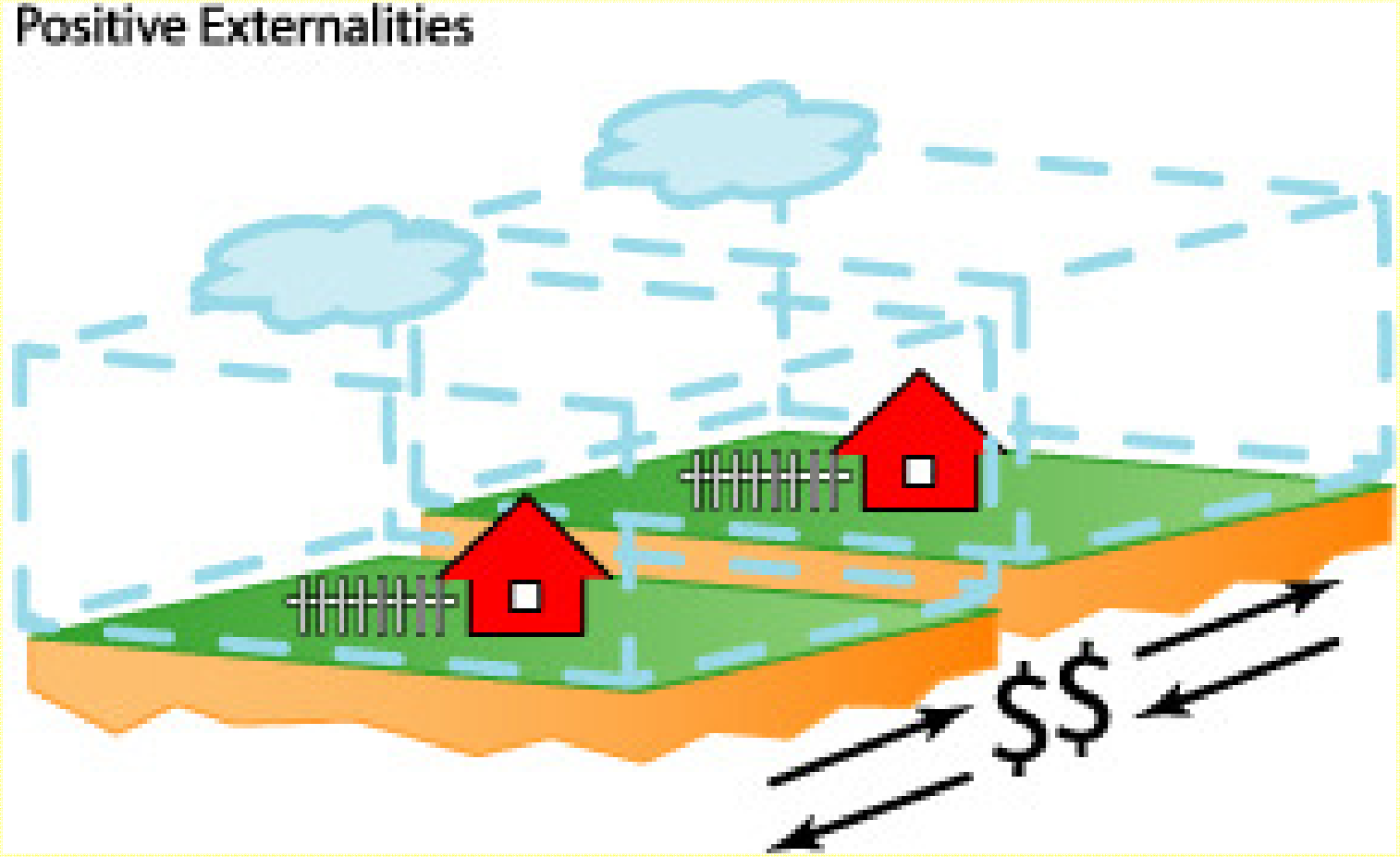

Noncontiguous Holdings

Later-Acquired Properties




Transfer of Development Rights
Grand Central

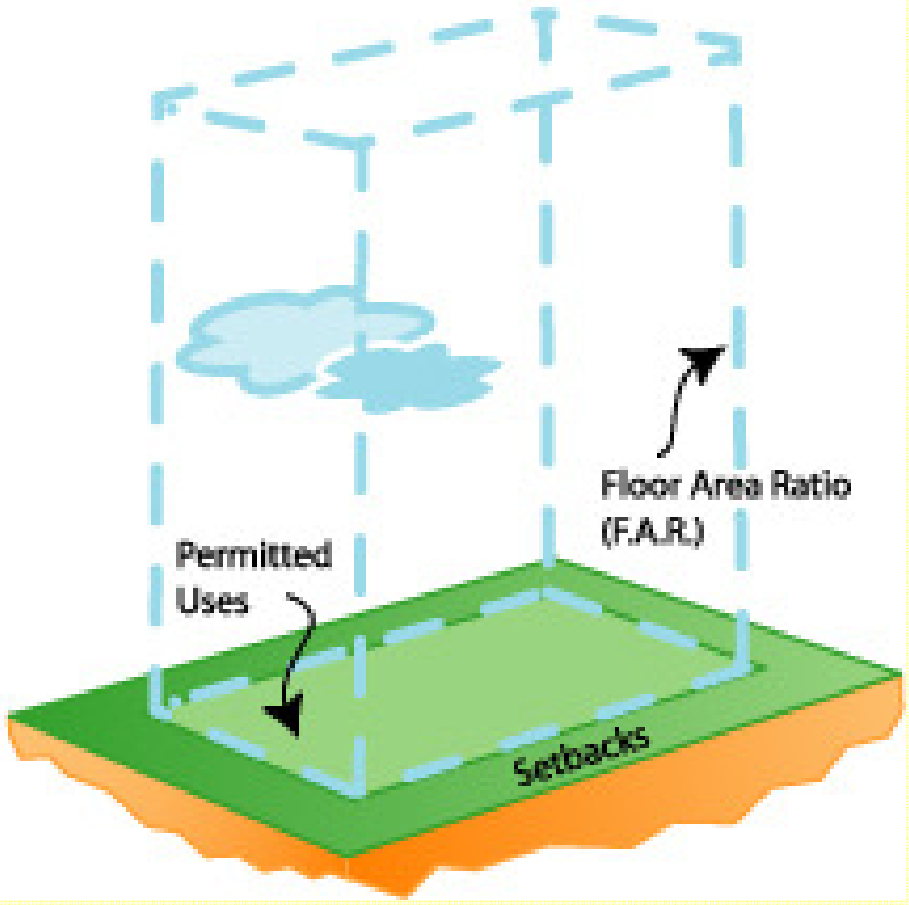
Positive Externalities

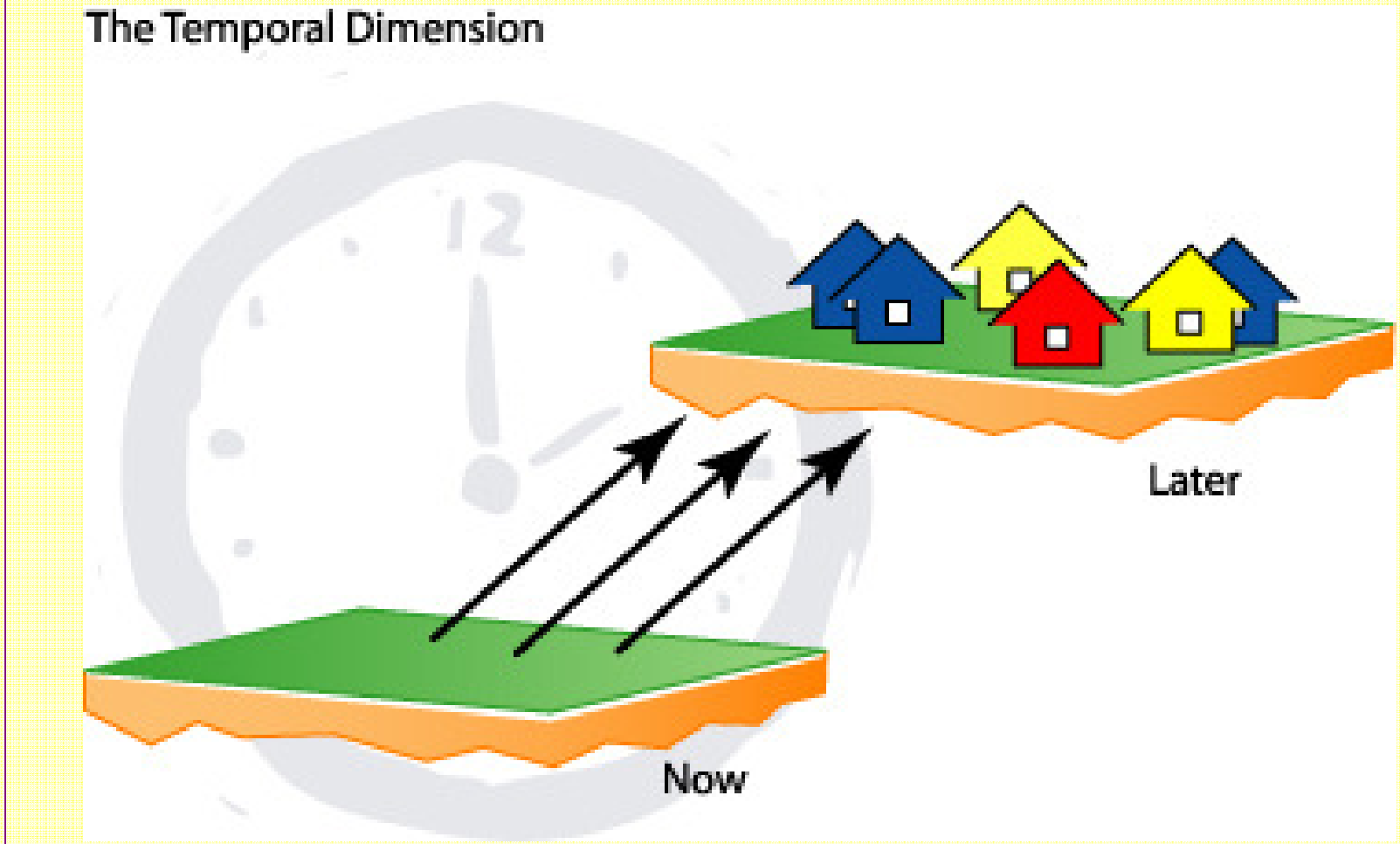


Encumbered Property



Functional Dimensions

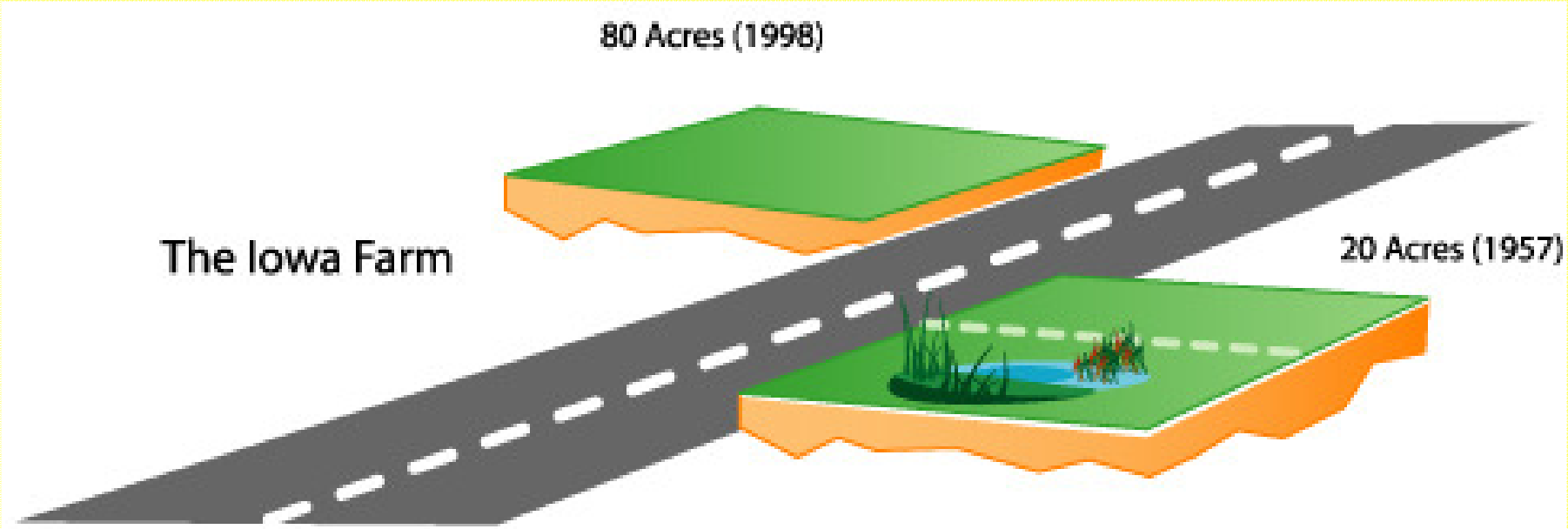



The Temporal Dimension
Later
Now

Let's Try a Hypothetical

- **An Iowa farmer sells his farm to move to Maui…**




80 Acres (1998)
The Iowa Farm
20 Acres (1957)

The Leading U.S. Supreme Court Cases

- *Pennsylvania Coal* (1922)
  - "Average reciprocity of advantage"
- *Penn Central* (1978)
  - Parcel as a whole
- *Andrus v. Allard* (1979)
  - Bird feather case; "bundle of sticks"

- ***Keystone Bituminous Coal*** **(1987)**
  - **2% is all**
- ***Lucas*** **(1992)**
  - **Footnote 7**
- ***Concrete Pipe*** **(1993)**
  - **Parcel as a whole…again**
- ***Palazzolo*** **(2001)**
- ***Tahoe-Sierra*** **(2002)**
  - **Three dimensions of the relevant parcel**

Some Other Federal Cases

- *Deltona* (Cl.Ct. 1981)
- *Florida Rock* (Fed.Cir 1986)
  - Really a numerator case…
- *Ciampitti* (Cl.Ct. 1991)
- *Tabb Lakes* (Fed.Cir. 1993)
- *Loveladies Harbor* (Fed.Cir. 1994)
- *Broadwater Farms* (Fed.Cir. 1997)

What's Relevant for the Relevant Parcel

- Degree of contiguity (horizontal or vertical)
- Treatment by owner in planning for the land
- Treatment by government regulation
- Date parcels acquired
- Whether parcels have been conveyed in contemplation of a taking claim

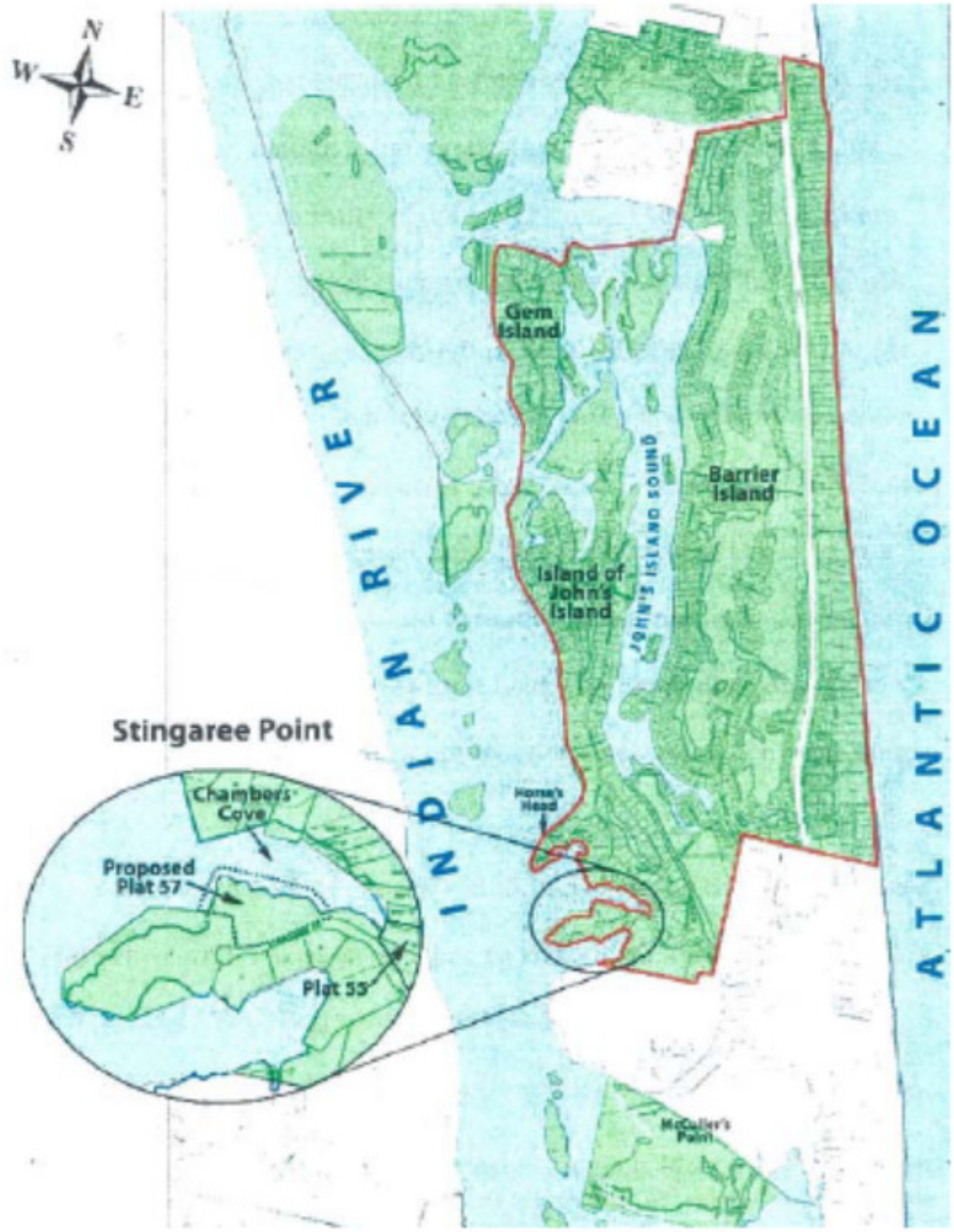
More Relevancies…

- Size and character of parcels customarily traded in the community (commercial unit)
- Extent to which restrictions benefit other areas of property
- Reasonable expectations of property owner
- Whether parcels have been combined for purposes other than takings

Facts

- **2004 sought permit to fill wetlands on Plat 57**
  - **4.99 acres**
  - **Part of 2,750-acre optioned development area**
    - **Under 1999 agreement**
- **Had developed 1,300 acres**

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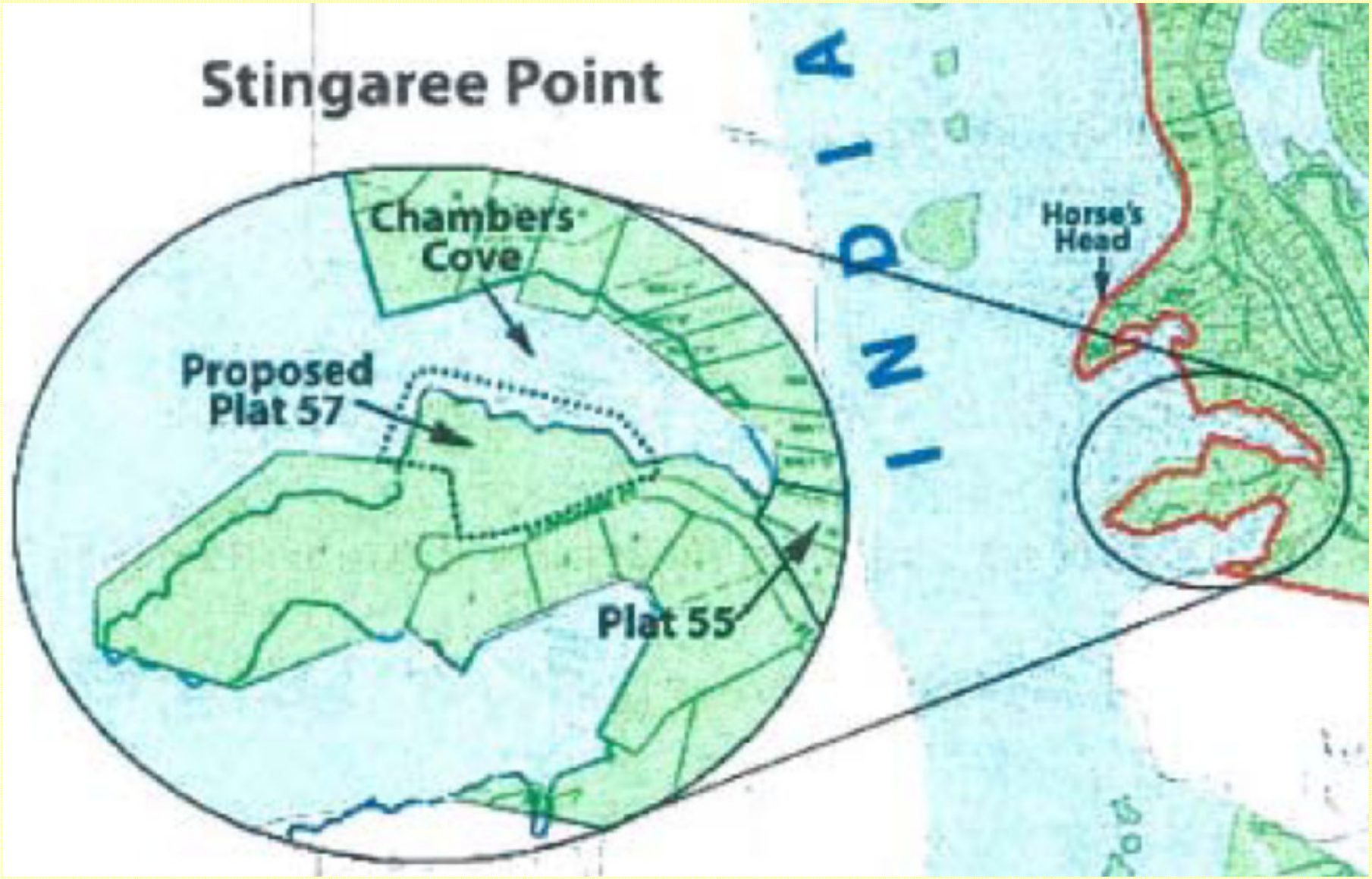
Gem Island
Barrier Island
Island of John's Island
JOHN'S ISLAND SOUND
INDIAN RIVER
ATLANTIC OCEAN
Stingaree Point
Chambers Cove
Proposed Plat 57
Plat 55
Horse's Head
McCullen's Point


Stingaree Point
Chambers Cove
Proposed Plat 57
Plat 55
Horse's Head
A
D
I
N
I



Stinagaree Point showing Plat 57

- **USACOE denied permit**
- **Lost Tree sued claiming a taking**
- **What is the relevant parcel?**
  - **Lost Tree: Plat 57**
  - **Government: All of John's Island**
- **Court rejected government:**

"physically and temporally remote from" its development of the rest of the community

- **Government rejected Lost Tree too:**

Relevant parcel is Plat 57 and Plat 55 "plus those scattered wetlands still owned by Lost Tree within the community of John's Island."

- **The calculus:**
  - **58.4% loss in value, apply *Penn Central* and…of course, you get no taking**

Federal Circuit

- **Reversed:**

The Court of Federal Claims by aggregating Plat 57, Plat 55, and the scattered wetlands as the relevant parcel. The only links between the two plats identified by the trial court are: 1) they are connected by the 323 foot strip of land owned by Lost Tree and therefore "undoubtedly contiguous," and 2) both currently are held with the "usage objective[ ] . . . to sell for profit the lots" on each plat.

Similarly, the scattered wetlands are only linked to Plat 57 by their geographic location within the gated community of John's Island. Here, the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis.

Q & A