IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

Case No. 3D12-777
Lower Tribunal No. CA-M-05-313 (Becker, J.)

GORDON BEYER AND MOLLY BEYER,

APPELLANTS,

vs.

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

APPELLEES.

APPELLANTS' INITIAL BRIEF

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I. STATEMENT OF THE CASE AND THE FACTS

A. Law of the case from prior appeal

The first appeal in this case, *Beyer, et al. v. City of Marathon, et al.*,[1] was decided in favor of the Beyers ("landowners") in 2010. In the first round, in 2008, the parties argued two issues before Circuit Judge David Audlin – the four-year statute of limitation and laches.[2] Judge Audlin ruled against the landowners on statute of limitations grounds, but did not rule on the laches issue.[3] Landowners appealed, raising only the statute of limitation issue in their Initial Brief. The governments' Answer Brief raised the statute of limitation issue – *and the laches issue*. Landowners responded appropriately in their Reply Brief. In this Court's 2010 *Beyer* opinion there is no mention of the laches claim.

B. A litigant does not get two bites of the apple simply because an appellate court did not mention an issue, raised in the briefs, in its opinion.

In *Bowles v. D. Mitchell Investments, Inc.*,[4] this Court noted that appellate courts may conclude that only points worth mentioning require discussion, but that does not mean an issue on which it is silent has not been determined. It is assumed to have been considered, but was not mentioned in the opinion because the Court did not deem it worthy of comment. In this case, the fact that the District Court's

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[1] *Beyer, et al. v. City of Marathon*, 37 So. 3d 932 (Fla. 3rd DCA 2010).

[2] The transcript of the hearing does not appear in the Index to Record on Appeal, but a portion of the transcript hearing is attached to this brief as Exhibit A.

[3] *RII*: 332-33.

[4] *Bowles v. D. Mitchell Investments, Inc.*, 365 So. 2d 1028, 1029 (Fla. 3d DCA 1978).

2010 opinion did not discuss laches in its opinion did not entitle the government to re-visit the laches issue on remand. Parties to litigation are generally entitled to have their arguments heard once at the trial level, and once again at the appellate level. Appellate courts have to separate the wheat from the chaff. If they had to comment on every issue raised in every brief, nobody would get anything done.

Two decades after *Mitchell Investments*, *supra*, the Florida Supreme Court reviewed a "law of the case" appeal from the Third District Court of Appeal, in *Florida Dept. of Transp. v. Juliano*.[5] The *Juliano* decision held:

> … the doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.
>
> ….
>
> … this Court in *U.S. Concrete,* 437 So. 2d at 1063, explained that the doctrine is "*limited to rulings on questions of law actually presented and considered on a former appeal*." (Emphasis supplied.) *See also Two M. Dev. Corp. v. Mikos,* 578 So. 2d 829, 830 (Fla. 2d DCA 1991). By reaffirming the principle articulated in earlier decisions that the law of the case doctrine is limited to questions of law actually presented and considered on a former appeal, *U.S. Concrete* was consistent with prior cases from this Court. (*Citations omitted)*. Additionally, the law of the case doctrine may foreclose subsequent consideration of issues implicitly addressed or necessarily considered by the appellate court's decision. (*Citations omitted)*.[6]

As counsel for the City of Marathon raised the laches issue in their Answer Brief in the previous appeal, it was clearly raised at that time, and presumably considered by the District Court of Appeal. After remand, the issue was improperly

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[5] *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101 (Fla. 2001).

[6] *Juliano*, 801 So. 2d at 105.

raised a second time before the trial court, as the prior decision of this court resolved the laches issue, sub silentio, in favor of the Beyers.

C. Consistent with *Collins I* and *Shands,*[7] the Third DCA's decision in *Beyer* reversed Judge Audlin's ruling that the four-year statute of limitation applies to land development in Monroe County. The reason for those decisions is Monroe County's "beneficial use determination" (or BUD) process, that makes it necessary for a landowner to petition the local government for a variance from otherwise confiscatory land development regulations.

This Court reversed the trial court's summary judgment on statute of limitations grounds, citing *Collins, et al. v. Monroe County, et al.,* that held:[8]

> "[o]rdinarily, before a takings claim becomes ripe, a property owner is required to follow 'reasonable and necessary' steps to permit the land use authority to exercise its discretion in considering development plans, 'including the opportunity to grant any variances or waivers allowed by law.'"[9] …. [T]he Beyers, in close proximity to the time the 1996 Plan was enacted, sought the quasi-judicial relief available to them via the BUD process. Based upon the information in the record, it appears that any delay in the processing of the Beyers' BUD applications, was not caused by any action or inaction on their part. It would be patently unfair, if not absurd, to allow the county, and later the City, to delay the timely processing of the BUD application, provide a determination after the expiration of the purported limitations period, and then claim the expiration of the limitations period as a defense.
>
> We find that the City's adoption of the special master's recommended BUD denial on September 27, 2005. effectively started the limitations period on the Beyers' as-applied taking claim and, therefore, the in-

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[7] The *Collins* and *Shands* opinions were released on December 31, 2008. The *Beyer* opinion was released on June 9, 2010. These three appeals won reversals.

[8] *Collins, et al., v. Monroe County, et al*., 999 So. 2d 709 (Fla. 3rd DCA 2007), *rev. denied*, 15 So. 3d 581 (Fla. 2009).

[9] Citing *Collins, supra*, at 716, relying on the Supreme Court's opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001).

> verse condemnation complaints against the City and the State of Florida were timely filed. …. Entry of summary judgment on the basis of the statute of limitations was therefore improper and, accordingly, we reverse.

Landowners maintain that, in the Florida Keys, a Beneficial Use Determination is one of those events that *must* occur to "fix the alleged liability of the government;" and the BUD process must be exhausted before any regulatory taking claim is ripe. This was addressed in *Collins* as follows.

> The BUD Ordinance was designed as a way to avoid constitutional takings lawsuits by providing other means of compensating for total or partial regulatory loss of economically beneficial use of property. In this way, *the BUD Ordinance differs from land use regulations in other jurisdictions in that it accounts for both facial and as-applied takings*, as seen in its bifurcated relief of either outright purchase of the property (in the case of a *per se* taking) or grant of Transferable Development Rights (TDRs), Rate Of Growth Ordinance (ROGO) points, variances and building permits (in the case of an as-applied taking).[10] [Emphasis added.]

D. The Course of Proceedings Below

(1) *The administrative proceeding*

Landowners filed their original BUD petition with the County on January 27, 1997,[11] prior to the November 30, 1999, incorporation of the City. Pursuant to a November 1, 2004, settlement in Landowners' mandamus action, the City agreed to process Landowners BUD application under the County's BUD regulations, as they existed on November 30, 1999, when adopted by the City.[12] The City's BUD

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[10] *Collins*, *supra*, at 716. [Emphasis added.]

[11] Complaint, ¶ 8; R-I: 5

[12] Plaintiffs' Request for Judicial Notice ("RJN"), Exh. D; R-3: 506-09.

hearing was conducted on July 13, 2005.[13] A recommended order was entered on September 7, 2005.[14] The City adopted the Special Master's recommended order on September 27, 2005, by Resolution 2005-122 – nearly nine years after Landowners had filed their BUD petition.[15]

(2) ***The pleadings***

On December 14, 2005, Landowners brought this regulatory taking action against the City.[16] The City answered the Complaint and served a Third-Party Complaint on the State of Florida.[17] The State answered the Third-Party Complaint and the City served a Reply.[18] Landowners served a direct Complaint on the State of Florida, and the State answered.[19]

(3) ***Defendants' first motion for summary judgment***

On September 30, 2008, Defendants moved for summary judgment on the grounds of the statute of limitation and laches.[20] Defendants also served the eight documents listed in Table 1 as their summary judgment evidence.

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[13] Defendants' Joint Motion for Summary Judgment ("MSJ"), p.4; R-II: 282.

[14] MSJ, Exh. 4, Recommended Order; R-II: 316-19.

[15] MSJ, p.4; R-II: 282.

[16] Complaint; R-I: 4-7.

[17] Answer; R-I: 95-104; Third-Party Complaint, R-I: 105-18.

[18] Answer to Third-Party Complaint; R-I: 154-58; Reply, R-I: 170-72.

[19] Landowners' Third-Party Complaint; R-I: 183-87; Answer, R-I:195-98.

[20] MSJ; R-II: 279-448.

TABLE 1: Defendants' Summary Judgment Evidence			
No.	**Document**	**Date**	**ROA**
1	Complaint and Summons	Dec. 14, 2005	R-II: 294-99
2	Landowners' 1st BUD application	Jan. 2, 1997	R-II: 300-05
3	Landowners' 2nd BUD application	Nov. 13, 2002	R-II: 306-14
4	Recommended Order to City	Sept. 7, 2005	R-II: 315-19
5	City's BUD Resolution, No. 2005-122	Sept. 27, 2005	R-II: 320-26
6	Transcript, City BUD Hearing	July 13, 2005	R-II: 327-87
7	Property Record Card, Bamboo Key	Sept. 26, 2008	R-II: 388-91
8	Transcript, Thomas Beyer deposition	July 10, 2008	R-II: 392-448

Landowners served a Request for Judicial Notice and an Affirmation attesting that an attached report, by City biologist Wendy Dyer, was a true and correct copy. Landowners' Request for Judicial Notice was granted during the summary judgment hearing. R-V: 4. The five documents listed in Table 2 constituted the Landowners' summary judgment evidence.

TABLE 2: Plaintiffs' Summary Judgment Evidence			
No.	**Document**	**Date**	**ROA**
1	Beneficial Use Determination Ordinance, § 9.5-171, *et seq*., Monroe County Code (1986)	Sept. 15, 1986	R-III: 495-97
2	Monroe County Ordinance 21-1998, implementing BUD provisions in 2010 Plan	June 19, 1998	R-III: 498-503
3	2010 Plan Policy 101.18.5, Beneficial Use Determinations	Jan. 4, 1996	R-III: 504-05
4	Joint Stipulation and Settlement in *Beyer v. City of Marathon,*16th Jud. Cir. Case No. CA-M-04-165	Nov. 1, 2004	R-III: 506-09
5	Report to BUD Hearing Officer by City biologist Wendy Dyer	June 6, 2005	R-III: 511-14

(4) *Appeal to Third District Court of Appeal*

On November 6, 2008, Circuit Judge Audlin dismissed this case on a Summary Judgment, on Statute of Limitation grounds. Landowners appealed to the Third District Court of Appeal, and the District Court reversed on June 9, 2010. *Beyers v. City of Marathon & State of Florida*.[21]

(5) *Defendants' Second Motion for Summary Judgment*

On November 22, 2011, Defendants again moved for Summary Judgment. More than seven years after the commencement of this case, and 15 years since the Beyers first applied for a beneficial use decision, Acting Circuit Judge Becker dismissed Beyers' regulatory taking claim for the second time, based on two grounds:

> a) The Beyers did not prove that in 1970 when they purchased the property, they had a reasonable investment backed expectation they could wait 30 years to develop the property; and
>
> b) Because the Beyers did nothing to develop their property for 30 years, the doctrine of laches bars their as applied regulatory taking claim.

This appeal followed.

E. Statement of the Facts

The Beyers accept the facts stated in this Court's 2010 opinion, except the statement that Beyers sought *quasi-judicial* relief in the BUD proceeding. They sought *executive* relief from the City Commission, which has to sign the BUD.[22]

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[21] *Beyers v. City of Marathon & State of Florida*, 37 So. 3d 932 (Fla. 3d DCA 2010)

[22] Although a hearing officer conducts a hearing, and renders a written recommendation, the City Council's decision is executive, not quasi-judicial. The Council has unfettered discretion to grant relief, such as granting a building permit or a

(1) ***Acquisition of the subject property in 1970***

In February 1970, the Beyers purchased the subject property for $70,000. According to Defendant's Summary Judgment motion, the property was assessed by the property appraiser at $72,000 in 1987, which dropped to $900 in 1988.[23] The property is an offshore island known as Bamboo Key, consisting of slightly under nine acres. At the time of purchase, the property was zoned General Use (GU), which allowed one single-family home per acre. At the time of purchase, the Beyers could have built at least eight single-family homes on the island.[24] At that time, undeveloped offshore islands were zoned "General Use," allowing development at a density of one Dwelling Unit ("DU") per acre.[25]

(2) ***Area of Critical State Concern Designation in 1975***

On April 25, 1975, the Florida Administration Commission designated the Florida Keys an Area of Critical State Concern (ACSC), pursuant to §380.05, Fla. Stat. *Askew v. Cross Key Waterways,*[26] where the supreme court reversed the 1975

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density variance, an offer to purchase the property, and so on. Or, as in this case, the Council can do nothing. *See* Art. VIII, sec. 2(b), Florida Constitution (municipality is vested with government, corporate and proprietary powers to enable it to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law).

[23] MSJ, p. 2, R-II: 280.

[24] *Id.*

[25] *Id.*

[26] *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978).

ACSC designation. The Legislature re-established the Florida Keys ACSC by statute, as of July 1, 1979, where it is codified at § 380.05, Fla. Stat.

After the 1975 ACSC designation, on December 29, 1975, Monroe County adopted Ordinance 21-1975, the "Major Development Project Ordinance," or MDPO. The MDPO defined a Major Development as any development involving a subdivision or a parcel that had "five acres or more of land and/or water." The Beyers' property consisted of approximately nine acres, and was not subdivided. Building a "major development" on nine acres, under the MDPO, was an expensive undertaking anywhere in the Keys, and much more so on an offshore island.

On September 15, 1986, Monroe County's 1986 Comprehensive Plan became effective, ending the MDPO. Contrary to the trial court's theory that the Beyers "did nothing" for 30 years, *the only window in which development of the subject property was feasible was the nearly six years between February 1970 and December 29, 1975*. The Beyers did not seek to build anything on Bamboo Key during those six years, but there is no statute or regulation that requires one to build as fast as possible. Many purchasers of properties in the Keys buy vacant property when they are relatively young, and build houses when their children are grown, or they are reaching retirement age and want to live in the Keys. From 1970 to 1975, given the state of Florida law at the time of, as well as Monroe County's ordinances and zoning regulations, the Beyers had no reason to believe the County or State would "take" their property without paying just compensation.[27]

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[27] *See, e.g., Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984).

(3) *Monroe County's 1986 Comprehensive Plan and the Beneficial Use Determination administrative process*

On September 15, 1986, the new Monroe County Comprehensive Plan ("1986 Plan"), mandated by § 380.05, Fla. Stat. (1986) – drafted in part by the County and in part by the Florida Administration Commission ("ADCOM") – downzoned Bamboo Key to "Offshore Island." this eliminated the Beyer's development possibilities, as the new density was one DU per *ten* acres.[28]

The 1986 Plan included a novel administrative process – a "Beneficial Use Determination" – presumably enacted to avoid invalidation of confiscatory 1986 Plan provisions. In 1986, the Florida Supreme Court's then-recent decision in *National Bulk Carriers*[29] held that, rather than giving rise to a claim for just compensation, confiscatory zoning ordinances are to be declared unconstitutional on Due Process grounds. Section 380.08(1), Fla. Stat., applicable to the Florida Keys Area of Critical State Concern, also prohibited confiscatory regulations, stating:

> Nothing in this chapter authorizes any governmental agency to adopt a rule or regulation or issue any order that is unduly restrictive or constitutes a taking of property without the payment of full compensation, in violation of the constitutions of this state or of the United States.

The 1986 Plan also included an unusual administrative procedure that purported to provide compensation for landowners whose expectations had been destroyed by the Plan. As *National Bulk Carriers* made clear, land use ordinances that precluded the use of property were deemed unconstitutional on due process

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[28] MSJ, pp. 2-3; R-II: 280-81.

[29] *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984).

grounds. One can reasonably assume that Monroe County's planners and attorneys recognized this problem, and recommended adoption of the 1986 "beneficial use" ordinance.

Six years later, in *Monroe County v. Gonzalez,*[30] this Court adopted the trial court's decision, as follows:

> The court finds that the other administrative remedy urged by the defendant, application for "beneficial use" pursuant to § 9.5-171, *et seq*., MCC, is not an adequate remedy for two reasons. First, the beneficial use provision only provides for relief which is "the minimum necessary to raise the investment-backed value of the property to forty (40) percent of its value immediately prior to the effective date" of the confiscatory regulations. The Fifth Amendment to the United States Constitution, and Art. X, § 6, of the Florida Constitution, require compensation in the amount of 100% of the fair market value, for its highest and best use, of property taken for public use, not 40%. *Therefore, the court finds that the beneficial use provision of the Monroe County Code is not an adequate administrative remedy when property has been taken in contravention of the Just Compensation clauses of the United States and Florida Constitutions*. Second, the beneficial use provision of the Monroe County Code requires a property owner to attempt to sell his property for 40% of its pre-regulation value, before he is eligible to apply for relief. …. [Emphasis added].
>
> IT IS ADJUDGED that §§ 9.5-262 and 9.5-343, Monroe County Land Development Regulations, as applied to plaintiff's property, have taken plaintiff's property for a public purpose without just compensation, in contravention of the Taking Clause of the Fifth Amendment to the United States Constitution, and Art. X, § 6, of the Florida Constitution. The regulations, as applied, are invalid as an unreasonable exercise of the police power. *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984).

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[30] *Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3d DCA 1992). The *Gonzalez* decision has the designation L.T. No. 88-1116-CA-18, indicating it was filed in 1988, only two years after the 1986 Plan went into effect.

To our knowledge, neither the Beyers, nor any other landowner, sought compensation under the flawed "beneficial use" ordinances §§ 9.5-262 and 9.5-343. After the 1992 *Gonzalez* decision, *supra*, Monroe County and the Florida Administration Commission agreed on a new Beneficial Use procedure in the County's 1996 Comprehensive Plan. This flawed "process" was in place for over ten years, until the revised comprehensive plan was approved in 1996.[31]

(4) ***Monroe County's "2010 Plan," adopted in 1996***

On January 4, 1996, another Monroe County Comprehensive Plan ("2010 Plan") – again drafted in part by the County and in part by ADCOM – further restricted uses on offshore islands. The 2010 Plan identified Bamboo Key as a bird rookery, and prohibited any development on islands with bird rookeries.[32] The 2010 Plan also revised the 1986 BUD regulations, giving the County *carte blanche* authority to vary *any* Comprehensive Plan element or LDR, if necessary to avoid a regulatory taking – subject to appeal by the Florida Department of Community Affairs ("DCA"), and reversal by the Florida Land and Water Adjudicatory Commission ("FLAWAC").[33] The relevant 2010 Plan BUD provision reads:

> Development approved pursuant to a Beneficial Use Determination shall be consistent with all other objectives and policies of the Comprehensive Plan and Land Development Regulations *unless specifically exempted from such requirements in the final Beneficial Use De-*

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[31] The City of Marathon did not come into being until 1999.

[32] MSJ, p.3; R-II: 281.

[33] § 380.07, Fla. Stat. (2009). Note that FLAWAC is comprised of ADCOM.

termination. *Adopted pursuant to Fla. Admin Code Rule 28-20.100(17).[34] [Emphasis added.]

(5) ***Landowners' 1997 Beneficial Use Determination petition to the County***

On January 27, 1997, Landowners petitioned the County for a BUD. When the City was incorporated on November 30, 1999,[35] the County had taken no action on Landowners' BUD petition, and Bamboo Key became part of the City.

(6) ***Landowners' 2002 Beneficial Use Determination petition to the City***

As a condition of incorporation, the City adopted Monroe County's LDRs and 2010 Plan.[36] Yet the City refused to process Landowners' pending BUD petition, and demanded a "new" BUD petition and a $3,000 fee.[37] In November 2002, Landowners submitted their "new" BUD petition and the $3,000 fee.[38] Two years later – after no action had been taken on their petition – Landowners instituted a mandamus action against the City.[39] The City settled the mandamus proceeding on November 1, 2004, by agreeing to render a final BUD within six months, and to conduct the proceeding "*in accordance with the beneficial use regulations in effect at the time of incorporation*."[40]

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[34] RJN, Exh. C, Policy 101.18.5; R-III: 504-05. The asterisk indicated this provision was promulgated by ADCOM as a State administrative rule.

[35] Ch. 99-427, § 3, Laws of Fla.

[36] Ch. 99-427, § 9 (6), Laws of Fla.

[37] Complaint, ¶ 11; R-I: 6.

[38] *Id*., ¶ 12.

[39] *Id*., ¶ 16.

[40] RJN, Exh. D; R-III: 506-09.

(7) ***The City's 2005 Beneficial Use Determination***

The City's BUD hearing was conducted July 13, 2005.[41] A recommended order was entered September 7, 2005.[42] The City adopted the Special Master's recommended order September 27, 2005, by Resolution 2005-122 – nearly nine years after Landowners had filed their BUD petition.[43] **The city's BUD concluded**: **"other than being allowed to enter onto the property to camp, there is absolutely no allowable use of the property under the [City's] Land Development Regulations**."[44] The City elected not to vary any LDRs or ComPlan provisions, nor provide for just and full compensation as required by the United States and Florida Constitutions. The City's premise was that Landowners had "waited too long" to develop Bamboo Key, and thus had no "investment-backed expectations" to any right to put Bamboo Key to economically valuable use."[45]

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[41] MSJ, p.4; R-II: 282.

[42] MSJ, Exh. 4, Recommended Order; R-II: 316-19.

[43] MSJ, p.4; R-II: 282.

[44] MSJ, Exh. 4, ¶ 7; R-II: 317.

[45] MSJ, Exh. 4, ¶ 16; R-II: 318.

II. SUMMARY OF ARGUMENT

A. In 1970, no law required the Beyers to develop their property by a date certain. Such a law would have been confiscatory, and if challenged would have been declared unconstitutional. Therefore, the trial court erred by requiring the Beyers to prove that in 1970 they had a reasonable investment backed expectation they could wait 30 years to develop their property or lose their right to bring a taking claim.

The trial court erred when it opined that a landowner cannot have reasonable investment-backed expectations unless she can forecast the next 30 years.

B. Because there is no legal requirement to develop property by a date certain and because an as applied regulatory taking claim does not accrue until the landowner has satisfied the ripeness requirement, the doctrine of laches cannot extinguish the Beyers' taking claim.

This issue was raised, and considered by the Third District Court of Appeal. Even though the issue is not mentioned in the 2010 opinion, the issue cannot be re-tried in this case.

III. ARGUMENT

A. In 1970, no law required the Beyers to develop their property by a date certain. Such a law would have been confiscatory, and if challenged would have been declared unconstitutional. Therefore, the trial court erred by requiring the Beyers to prove that in 1970 they had a reasonable investment backed expectation they could wait 30 years to develop their property or lose their right to bring a taking claim.

(1) *The standard of review is de novo*

These are interrelated questions of law and the standard of review is *de novo*. *Wickham v. State*, 998 So. 2d 593 (Fla. 2008).

(2) *Florida takings law is controlled by the United States Supreme Court*

The issues in this case are controlled by the existing interpretation of the United States Constitution by the United States Supreme Court.[46] Prior to 1990, Florida courts did not entertain regulatory taking claims. *Joint Ventures v. Dept. of Transportation*,[47] In 1974, in *Mailman Development Corp v. City of Hollywood*,[48] the Fourth DCA held property owners could not bring an inverse condemnation action against local governments, and that confiscatory zoning ordinances are either invalid or unenforceable, stating:

> We hold that enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation

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[46] *See, e.g.*, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011); *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp*., 640 So. 2d 54, 58 (Fla. 1994); *Joint Ventures, Inc. v. Dep't of Transp*., 563 So. 2d 622, 623 (Fla. 1990).

[47] *Joint Ventures v. Dept. of Transportation,* 563 So. 2d 622 (Fla. 1990).

[48] *Mailman Development Corp v. City of Hollywood,* 286 So. 2d 614, *cert. denied*, 293 So. 2d 717 (Fla. 1974), *cert. denied,* 419 U.S. 844 (1974)

> for the taking of the property through inverse condemnation. Cf., *City of Miami v. Romer*, Fla. 1952, 58 So. 2d 849. If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory or confiscatory (as appellant has alleged in other counts still pending before the trial court), *the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property*. [Emphasis added.]

Ten years later, the Florida Supreme Court reached the same conclusion in *Dade County v. National Bulk Carriers,*[49] citing *Mailman,* among other decisions, and holding that confiscatory zoning ordinances are unconstitutional on Due Process grounds. The supreme court held:

> Under the type of statutory permitting-scheme involved in *Key Haven, Albrecht*, and *Graham v. Estuary*, it was contemplated that its application may result in a taking. Such is not the case in the application of a zoning ordinance. To be valid, it must be reasonable. If a zoning ordinance is confiscatory, the relief available is a judicial determination that the ordinance is unenforceable and must be stricken. [Citations omitted.] *We hold that this cause should be remanded to the circuit court for a determination of whether the county's action is confiscatory and constitutes a taking without just compensation, in which event the action of the board must be stricken. A denial of rezoning cannot be both reasonable and confiscatory*. [Emphasis added.]

In 1989, we saw the first suggestion that Florida landowners might have a right to bring regulatory takings against local governments' land development regulations in *Bensch v. Dade County.*[50] In a footnote, this court suggested "maybe" there was such a right, as follows.

> The appellants recognize, however, that no right to damages resulting from even an invalid regulation arises under Florida law. *See Dade*

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[49] *Dade County v. National Bulk Carriers,* 450 So. 2d 213 (Fla. 1984).

[50] *Bensch v. Dade County,* 541 So. 2d 1329 (Fla. 3d DCA), *rev. denied*, 549 So. 2d 1013 (Fla. 1989).

> *County v. National Bulk Carriers, Inc.*, 450 So.2d 213 (Fla. 1984). Because of our finding that no violation at all was pled in this case, we need not decide whether this rule has been affected by the *apparent holding of the United States Supreme Court to the contrary* in *First English.*[51] [Emphasis added.]

In 1990, the Florida Supreme Court finally recognized, in *Joint Ventures v. Dept. of Transportation*,[52] that the Supreme Court's 1987 *First English* decision does say landowners have a right to bring a regulatory taking claim against local government entities, as set out below.

> DOT contends that Joint Ventures' right to seek compensation through inverse condemnation cures the statute's failure to expressly provide for compensation. We disagree. Although the right to seek relief through inverse condemnation is implied in the constitution and a compensation provision need not be expressly included for an owner to be entitled to such compensation, *see First English*, that remedy is not equivalent to a property owner's remedy under the doctrine of eminent domain. Inverse condemnation affords the affected property owner an after-the-fact remedy, when there has already been a "taking" by regulation, and it is not a substitute for eminent domain protection facilitated by chapters 73 and 74.
>
> The property owner who must resort to inverse condemnation is not on equal footing with an owner whose land is "taken" through formal condemnation proceedings. The former has the burden of seeking compensation, must initiate the inverse condemnation suit, and must finance the costs of litigation without the procedural protections afforded the condemnee.

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[51] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)

[52] *Joint Ventures v. Dept. of Transportation*, 563 So. 2d 622 (Fla. 1990)

The United States Supreme Court has established "ripeness" requirements for a takings claim in federal court. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*,[53] Florida courts have adopted similar ripeness requirements.

(3) *Penn Central factors - reasonable investment backed expectation*

In *Penn Central Transportation Co. v. New York City*,[54] ("*Penn Central*"), the United States Supreme Court stated there is no "set formula" for evaluating regulatory taking claims. The Court identified certain factors to evaluate to determine whether a taking occurred, the primary factor being:

> [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id*. ("DIBE" or "RIBE").

In *Penn Central*, the Supreme Court stated that the "character of the government action," i.e., such as whether the action constitutes a physical invasion, or merely impacts property interests. These factors may be relevant to a determination of whether a taking has occurred. The *Penn Central* standard has served as the principal guide for assessing allegations that a regulatory taking has occurred where the government action does not fall within the "physical invasion" or *Lucas* takings categories.

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[53] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985) ("Williamson County")

[54] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) ("*Penn Central*")

Assuming, *arguendo,* the Beyers' claim is based on a partial taking rather than a total or "*Lucas*"[55] taking, the trial judge misapplied the *Penn Central* analysis by requiring the Beyers to prove that in 1970 they had a reasonable, investment-backed expectation they could develop the property 30 years later. Although the trial court cited *Department of Environmental Protection v. Burgess*[56] for the proposition that RIBE is determined by the facts at the time of purchase, she expanded the holding to require the property owner to predict what would be reasonable decades later.

There is no authority in Florida or Federal taking law requiring a landowner who chooses not to develop her property immediately, to prove 30 years later that his or her acquisition of the property was "investment-backed" 30 years earlier. Not only would the purchaser have to speculate far into the future, such a requirement would require the ability to predict the value of 1970 dollars, and real estate values, 30 years into the future. If a purchaser – or opposing counsel, or the trial judge – could predict the value of real estate 30 years in the future, that person is in the wrong business. They should be billionaires on Wall Street rather than landowners in the Keys.

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[55] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-32, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) ("*Lucas*").

[56] *Department of Environmental Protection v. Burgess*, 772 So. 2d 540 (Fla. 1st DCA 2000).

Some courts are moving away from putting an "expiration date on the taking clause." In *Palazzolo v Rhode Island*,[57] a plurality of the Court wrote:

> The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, *e.g.*, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998). So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. … The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. … Were we to accept the State's rule, the post enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. *Id*., at 533 U.S. 626.

B. Because there is no legal requirement to develop property by a date certain and because an as applied regulatory taking claim does not accrue until the landowner has satisfied the ripeness requirement, the doctrine of laches cannot extinguish the Beyers' taking claim.

(1) *The standard of review is de novo*

These are interrelated questions of law and the standard of review is *de novo*. *Wickham v. State*, 998 So. 2d 593 (Fla. 2008).

This issue was raised in the Third DCA's 2010 decision in the prior appeal in this case, and therefore was considered by the Court and rejected, even though

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[57] *Palazzolo v. Rhode Island*, 533 U.S. 606, 619-22 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) ("*Palazzolo"*).

there is no mention of laches in the opinion. Neither the government nor the trial court should have attempted to resurrect was has already been decided.

In the alternative, the trial court reasoned the taking claim was barred by the doctrine of laches because, "in the face of ever tightening regulations," the Beyers made no effort to do anything to develop the property for over 30 years. The trial court relied on the following cases to support summary judgment: *Monroe County v. Ambrose*,[58] *Good v. United States*,[59] *McCray v. State*,[60] and *Pascoag Reservoir & Dam, LLC v. Rhode Island*.[61] None of these decisions support the trial court's decision.

Ambrose was a vested rights case. The issue in *Ambrose* was whether merely recording a plat was sufficient to create a vested right to build a single family home under Section 380.05(18), F.S. This Court held:

> Therefore, we conclude that the Landowners must show they relied on Section 380.05(18), and changed their position in furtherance of developing their land, in order to have vested rights to develop their property. See *Equity Res. Inc. v. County of Leon*, 643 So. 2d 1112 (Fla. 1st DCA 1994) (vested rights were established based on acts of reliance where property was purchased under contract contingent on rezoning). We are unable to determine if the Landowners' rights are vested because the trial court's determination rested solely on the Landowner's recordation of property and did not address the reliance issue. Therefore, we remand this matter back to the trial court to de-

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[58] *Monroe County v. Ambrose*, 866 So. 2d 707 (Fla. 3d DCA 1999) ("*Ambrose*").

[59] *Good v. United States*, 189 F. 3d 1355 (Fed. Cir. 1999) ("*Good*").

[60] *McCray v. State*, 699 So. 2d 1366 (Fla. 1997) ("McCray").

[61] *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F. Supp 2d 228 (D.R.I. 2002) ("*Pascoag Reservoir")*.

> termine, based on the foregoing analysis, whether these Landowners have vested rights.

Ambrose includes the following comments, both of which were relied on and quoted by the trial court in the summary final judgment:

> a) It would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land.
>
> b) If the Landowners did not start development prior to the enactment of these land regulations, they acted at their own peril *in relying on the absence of zoning ordinances.*" [62]

The trial judge erred by accepting the argument that if a vested rights claim can be extinguished by inaction, so can an as-applied regulatory taking claim.

Good is helpful to the Beyers' position. In *Good,* the court held that prolonged inaction does not bar a takings claim. "Prolonged inaction does not bar his taking claim, it reduces his ability to fairly claim surprise when his permit is denied." 189 F. 3d 1355, at 1363. *Good*, however is factually inapposite to the Beyers' claim. The issue in *Good* was whether the landowner had a reasonable, investment-backed expectation he could develop a 43 acre parcel on Sugarloaf Key, consisting of 32 acres of wetlands and 8 acres of uplands. The Court affirmed the summary judgment because Good could not demonstrate that reasonable, investment-backed expectation because the purchase agreement warned him that most of the property was below the mean high tide line and there would be "problems ob-

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[62] The government's motion for summary judgment and the final summary judgment fail to include the last phrase of the second quote - *in relying on the absence of zoning ordinances*.

taining permits to fill the land." *Good* is further distinguished as Good was able to develop 25% of the property.

McCray v. State was a habeas corpus proceeding based on a claim of ineffective assistance of counsel. The Court held that a claim of ineffective assistance was barred by laches if brought more than five years from the date of conviction. It remains to be seen how *McCray* applies to regulatory taking claims.

In *Pascoag Reservoir & Dam, LLC v. Rhode Island,* the Federal District Court was required to determine how state property law and constitutional law interact, in a taking claim based on adverse possession and prescription, that occurred more than 26 years earlier. The District Court found the federal taking claim was ripe because no state court remedy was available. Unlike a regulatory taking claim where title or possession does not pass to the government, the Court applied the statute of limitations and the doctrine of laches because the state acquired title and possession of the property 26 years earlier.

IV. CONCLUSION AND RELIEF SOUGHT

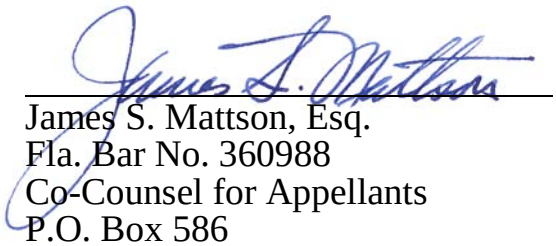
A. Summary judgment was improperly granted in this case.

B. Assuming the Beyers claim is based on a partial taking, the law does not require the Beyers to prove that in 1966 they had a reasonable investment expectation they could wait thirty years to develop the property. If the Beyers had a reasonable investment backed expectation when they purchased the property, their taking claim does not "expire" by inaction for thirty years.

C. The doctrine of laches does not apply to bar a regulatory taking claim.

D. Before challenging Beyer's regulatory taking claim based on the Penn Central analysis, the government must first negate that Beyers taking claim is not a Lucas or total taking.

Appellants pray for an order REVERSING the summary final judgment in this case, and REMANDING this case to the trial court for further proceedings.



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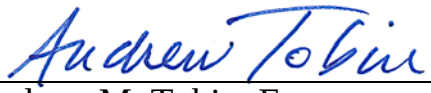

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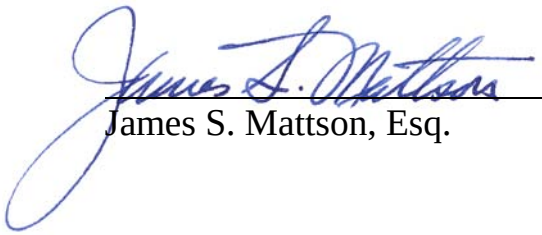
V. CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing by first class mail, postage prepaid, on **ADAM M. SCHACHTER, ESQ.** Gelber Schacter & Greenberg, PA., Attorney for Appellee City of Marathon, 1441 Brickell Avenue, Suite 1420, Miami, Florida, 33131-3426 and **JONATHAN A. GLOGAU, ESQ**., Attorney for the State of Florida, Special Counsel, PL-01 The Capitol, Tallahassee, FL 32399-1050, this 18th day of September 2012.



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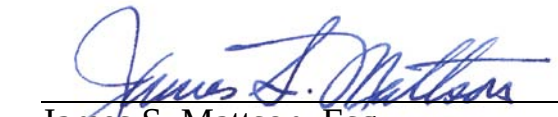
VI. CERTIFICATE OF FONT COMPLIANCE

I certify that the foregoing brief was prepared with Microsoft Word 2003, using 14-point, Times Roman and 12-point Courier font.



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