IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

GORDON BEYER and MOLLY BEYER,

Appellant,

vs.

CITY OF MARATHON, FLORIDA and
THE STATE OF FLORIDA,

Appellee.

_____/

DCA Case No: 3D12-777
L.T. Case No: CA-M-05-313

ANSWER BRIEF OF APPELLEES, CITY OF MARATHON, FLORIDA AND THE STATE OF FLORIDA

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

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I. Statement of the Case and Statement of Facts

A. The Beyers' Property.

In February 1970, Gordon Beyer and Molly Beyer (the "Beyers") purchased an offshore island known as Bamboo Key for $55,000 ("Property"). [R. Vol. II, 382].[1] The Property is almost nine acres in size. [R. Vol. II, 377]. At the time of purchase, the applicable zoning for the Property was General Use ("GU"), generally allowing one single family home per acre to be built on the Property. [R. Vol. II, 377].

On September 15, 1986, Monroe County's 1986 Comprehensive Plan and Land Development Regulations ("1986 Regulations") went into effect. The 1986 Regulations established more stringent guidelines regarding development on environmentally sensitive land, including specific restrictions for development on offshore islands. The 1986 Regulations changed the Property's zoning from GU to OS, which, among other things, imposed a density limit of one unit per ten acres. [R. Vol. II, 377]. It is undisputed that the restrictions on the Property's development became more stringent by operation of the 1986 Regulations. The Beyers did not challenge the adoption of the 1986 Regulations.

[1] In their 1997 Application for a Determination of Beneficial Use, the Beyers stated they purchased the property for $60,000. [R. Vol. II, 376]. In their 2002 Application for a Determination of Beneficial Use, the Beyers stated they purchased the property for $55,000. [R. Vol. II, 382]. In his "Findings of Fact," the Beneficial Use Hearing Officer stated the Beyers purchased the property for $55,000. [R. Vol. II, 392).

Consistent with the development restrictions placed on the Property by the 1986 Regulations, the Monroe County Property Appraiser sharply reduced the assessed value of the Property. From 1982 (the earliest year for which such records are available) through 1987, the Property had an assessed value of $72,000. [R. Vol. III, 464-465]. From 1988 through the present, however, the Property's assessed value has been $900. [*Id.*]. The Beyers did not challenge or otherwise appeal the Property Appraiser's reduction to the Property's value.

The Monroe County Year 2010 Comprehensive Plan (the "2010 Plan"), which was effective as of January 2, 1996 and July 17, 1997, further restricted development of offshore islands, thus the restrictions on the Beyers' Property became even more stringent because it was identified as a bird rookery. Under the 2010 Comprehensive Plan, virtually no development was allowed on properties identified as bird rookeries. The Beyers did not challenge the adoption of the Monroe County Year 2010 Comprehensive Plan.

B. The Legal Proceedings and The First Judgment.

The Complaint in this case was filed on December 14, 2005. The lone alleged basis for the taking claim is that: "[The Beyers] had been denied all reasonable economic use of their property by virtue of later enacted land development regulations, on January 27, 1997." [R. Vol. II, 371 at ¶ 8]. Based on that allegation, the Beyers sought "full compensation." [R. Vol. II, 373 at ¶ 22].

The City filed its Answer and Affirmative Defenses to the Complaint and asserted that the Beyers could not establish reasonable investment-backed expectations with respect to the Property. [R. Vol. I, 177]. The City also argued that Beyers' claim is barred by the doctrine of laches. [R. Vol. I, 177]. The State asserted similar defenses in its answer. [R. Vol. II, 246-250].

During discovery, on numerous occasions, the City attempted to schedule the depositions of both Gordon Beyer and Molly Beyer. The City's counsel sent e-mail after e-mail requesting their availability. [R. Vol. III, 526-531]. The Beyers, however, simply refused to make themselves available. Consequently, neither Gordon Beyer nor Molly Beyer gave any sworn testimony in support of their claims in this case. [R. Vol. III, 526-531].

The City and State filed a joint motion for summary judgment, arguing that Beyers' taking claim was barred by Florida's statute of limitations and the laches doctrine. Judge Audlin granted summary judgment against the Beyers and in favor of the City and State, finding the lawsuit barred by the four-year statute of limitations imposed by section 95.11(3)(p), Florida Statutes. [R. Vol. II, 332-333]. Judge Audlin did not reach the issue of whether the claim was barred by the laches doctrine. [R. Vol. II, 332-333].

This Court reversed the 2008 summary judgment order finding the Beyers' claim was not barred by the statute of limitations. *See Beyer v. City of Marathon,*

37 So. 3d 932 (Fla. 3d DCA 2010); *see also* R. Vol. II, 338-343. The Court concluded that the 1996 Land Development Regulations did not deprive the Beyers of all reasonable economic use of the Property. The Court stated that the Property could be used for "camping and other recreational uses...[and] has transferrable development rights." *Id.* at 934. Therefore, the Beyers "were not at all precluded from claiming an as-applied taking of their property." *Id.* at 934. As a result, "based upon the information in the record," the Court concluded the entry of summary judgment on the basis of the expiration of the statute of limitations was error. *Id.* at 935. Therefore, the action was remanded.

In a case with related issues, the Court gave specific instructions to the trial court and stated that "[o]n remand, it remains for the trial court to determine whether, given the Shands' economic expectations, the City's denial of the BUD application rises to the level of a compensable as-applied taking under state and federal law. The trial court must determine whether, and what, compensation is to be made under the circumstances, whether the City must grant TDRs equivalent to the buildable upland property or purchase the property outright." *Shands v. City of Marathon*, 999 So. 2d 718, 727 (Fla. 3d DCA 2008).

C. The Proceedings On Remand and The Second Judgment In Favor Of The City And State.

On remand, the Appellees again filed a joint motion for summary judgment. [R. Vol. II, 352-366]. The motion was supported by voluminous documentation.

[R. Vol. II, 365-410; Vol. III, 411-556]. The Beyers again failed to introduce any evidence and did not file an affidavit in response to the Appellees' Joint Motion for Summary Judgment. The lone act by the Beyers in opposition to the summary judgment motion was to ask the trial court to take judicial notice of certain Monroe County Land Development Regulations. [R. Vol. III, 557-558].

On February 29, 2012, the trial court entered its order granting the City of Marathon and State of Florida's Joint Motion for Summary Judgment. [R. Vol. III, 565-570]. The trial court stated that based upon the holding of this Court in *Beyer v. City of Marathon*, 37 So. 3d 932 (Fla. 3d DCA 2010), the court would "consider the frustration of the [Beyers'] investment-backed expectations as a necessary element of their taking claim." [R. Vol. III, 566].

In accordance with existing case law, the trial court stated that the "investment backed expectations factor requires *evidence* that a particular regulation interfered with a plaintiff's reasonable, distinct, investment-backed expectations held at the time he purchased the property." [R. Vol. III, 566 (citations omitted)]. In this case, the Beyers were "unable to point to any such evidence...and thus they [could] not show that their distinct, reasonable investment-backed expectations have been frustrated." [R. Vol. III, 567]. The Beyers not only failed to refute the evidence presented by the Appellees, but did not present any evidence whatsoever in opposition to the motion. Therefore, the

trial court determined summary judgment against them was appropriate. [R. Vol. III, 568-569].

The trial court also determined that the Appellants claims were barred by the doctrine of laches. The trial court's ruling stated that "[a]pplying the laches elements and the case law guidance to this case, it is clear the Plaintiffs' claim should be barred. The federal, state and local regulations governing the development of the property have become more stringent since the date of purchase in 1970 and the property has been unbuildable since 1986, yet Plaintiffs waited nearly twenty years to bring this action. A two decade delay clearly in brining suit demonstrates a clear lack of diligence." [R. Vol. III, 569]. After concluding the Appellees had been prejudiced by the delay of the Appellants, the trial court held that the doctrine of laches barred the claim. [R. Vol. III, 569].

II. Standard of Review

The trial court's order granting the Appellees' Joint Motion for Summary Judgment should be reviewed *de novo*.

III. Summary of Argument

The trial court correctly entered judgment in favor of Appellees on two distinct grounds. First, the trial court correctly applied the standard for the Beyers' taking claim, which "is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations." *Collins v. Monroe*

County, 999 So. 2d 709, 713 (Fla. 3d DCA 2008) (*citing Penn Central Transp. v. City of New York,* 438 U.S. 104 (1978)). In this case, the Beyers presented no evidence whatsoever that a substantial deprivation of economic use occurred or as to their reasonable investment-backed expectations. The Appellees, however, presented unrefuted evidence that the Beyers had no investment expectation at any time. Therefore, based upon the unrefuted evidence, the trial court concluded the Beyers had no investment-backed expectation and could not prevail on their claim.

As a second basis for entering judgment against the Beyers, the trial court concluded that "it is clear [the Beyers] claim should be barred" by the doctrine of laches. [R. Vol. III, 569]. As the trial court correctly concluded, the Appellees were certainly prejudiced by the Beyers delay in seeking to assert a takings claim. Further, evidence was certainly lost in the time that has passed since 1970 when the Beyers purchased the property, since the time the alleged taking accrued, and today. The Beyers sat on their rights and the trial court correctly concluded the doctrine of laches precluded them from belatedly pursuing their claim.

The trial court's properly entered judgment for the Appellees and the judgment should be affirmed.

IV. Argument

A. The Beyers Failed To Present Any Evidence To Establish Their Investment-Backed Expectations At The Time Of Purchase. Therefore, The Trial Court Properly Entered Judgment Against Them.

The Beyers filed a lawsuit asserting "they have been denied all reasonable economic use of their property by virtue of later enacted land development regulations..." [R. Vol. II, 371]. The claim relates to a piece of property they purchased in 1970 for $55,0000, and for which they never sought to develop nor did they introduce evidence that they even thought about developing the property. In analyzing whether or not there has been a taking, as claimed by the Beyers, the Supreme Court has provided the following factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The Beyers failed, entirely, in establishing the investment-backed expectation factor.[2]

The investment-backed expectations factor requires *evidence* that a particular regulation interfered with a plaintiff's "reasonable, distinct, investment-backed expectations held at the time [the plaintiff] purchased the property." *Dep't*

[2] The issue was not discussed in the trial court's judgment, however, the Beyers also failed to satisfy the first and third elements of the *Penn Central* analysis.

of Envtl. Prot. v. Burgess, 772 So. 2d 540, 543 (Fla. 1st DCA 2000) (citing *Penn Central*).[3] The trial court correctly concluded that the Beyers failed to produce any evidence whatsoever regarding their investment backed expectations at the time they purchased the property. The Beyers argue that there is no authority that requires them to establish that the acquisition of the property was investment backed at the time of purchase. This is patently at odds with the well-established case law and this Court's 2010 Opinion in this case. Even if the Beyers' assertion were true, the judgment should be affirmed. The Beyers failed to introduce any evidence whatsoever in opposition to summary judgment regardless of the time frame.

In support of reversal, the Beyers assert the trial court misapplied the First District's holding in *Burgess* by expanding the "holding to require the property owner to predict what would be reasonable decades later." *See* I.B. at pg. 20. However, the trial court did not misapply *Burgess*. *Burgess* stated exactly what the trial court attributed to it. In *Burgess*, the First District held that "[t]o establish his claim of a compensable regulatory "total" taking of his property, appellee also was

[3] The length of time the Beyers owned the Property without seeking to develop it in any manner is a strong indication that they bought the Property for speculative investment. Notably, *Burgess* specifically held that such speculative investment is not protected by the Constitution. *Burgess*, 772 So. 2d at 544 ("A landowner, however, does not have a right to gain a profit from an investment in land, *see Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), and the frustration of speculative economic gain is not protected by the Takings Clause, *see U.S. v. Grand River Dam Auth.*, 363 U.S. 229, 80 S.Ct. 1134, 4 L.Ed.2d 1186 (1960).").

required to demonstrate that the permit denial interfered with his ***reasonable, distinct, investment-backed expectations, held at the time he purchased the property***, to the extent that the government should compensate him." *Burgess*, 772 So. 2d at 543 (emphasis supplied). Clearly, the First District held that a plaintiff is required to demonstrate its reasonable investment-backed expectation at the time of purchase.

The holding in *Burgess*, however, is not a novel conclusion. The First District reached the same conclusion in *Leon County v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. 1st DCA 2004), wherein the court held that "[t]he *Penn Central* investment-backed expectation factor limits a takings recovery to plaintiffs who can establish that ***they bought their property*** in reliance on a state of affairs that did not include the challenged regulatory regime." *Id.* (internal quotations and citations omitted). Importantly, in *Collins v. Monroe County*, 999 So. 2d 709, 718 (Fla. 3d DCA 2008), this Court reached a similar conclusion and held that a "court must take into consideration the reasonable investment-backed expectations of each Landowner ***relative to date of purchase*** (pre- or post-land use regulation) and post-BUD resolution events." *Id.* (emphasis supplied). The Beyers are unable to point to any such evidence in the record, and thus they cannot show that their distinct, reasonable investment-backed expectations have been frustrated.

The record establishes, without dispute, just the opposite. For example, at the time of purchase in 1970, the Property was a pristine, completely uninhabited island without any semblance of development — i.e., no running water, no power, no sewer, etc. — and it remains in that state to this day. [R. Vol. II, 360]. The development history of the Property — *i.e.*, the lack of it — is similarly undisputed, with Plaintiffs having never made any application to the City, County, State or the United States for a building permit or any sort of development rights (other than for a October 18, 2000 permit to build a dock — which is an accessory structure requiring that there be a principal structure on the property). [R. Vol. II, 393].

This undisputed evidence forecloses any argument with respect to Plaintiffs' distinct, reasonable investment-backed expectations. As this Court has held, "[a] subjective expectation that land can be developed is no more than an expectancy and does not translate into a vested right to develop the property. 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." *Shands v. City of Marathon*, 999 So. 2d 718, 724-725 (Fla. 3d DCA 2008) (internal citations omitted). Similarly, as cited above, in Collins this Court held that "[i]f the Landowners did not start development prior to the enactment of these [1986] land regulations, they acted at their own peril in relying on the absence of zoning

ordinances." *Collins v. Monroe County*, 999 So. 2d 709, 718 n.16 (Fla. 3d DCA 2008) (citation omitted). This principle of law applies on all fours in this action. Here, the Beyers invested nothing and also failed to start development prior to the enactment of the 1986 land development regulations. Accordingly, summary judgment was property entered and should be affirmed by this Court.

Similarly, in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), the Federal Circuit affirmed a summary judgment in favor of the government based on a lack of reasonable investment-backed expectations. There, the property owner waited "seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1362. Based on this "prolonged inaction," the court found that plaintiff lacked reasonable investment-backed expectations and, importantly, expressly found that summary judgment is appropriate under such circumstances. *Id.* at 1362-1363 (citations omitted). Here, where the period of inaction was decades longer than seven years, summary judgment was certainly appropriate.

Regardless of the time frame, the Beyers are unable to point to any evidence establishing a reasonable investment-backed intent to develop the property in question. They do not do so relative to the time they purchased the property, and they do not do so at the time any of the relevant regulations were enacted. Mr. Beyer and Mrs. Beyer did not testify at a deposition, despite repeated attempts to

schedule same, and they did not file any affidavit or sworn evidence in opposition to summary judgment. In short, the Beyers did not introduce any evidence of a reasonable investment-backed expectation with respect to the property in question.

The trial court's judgment should be affirmed.

B. The Trial Court Correctly Determined That The Doctrine of Laches Barred The Beyers' Claims.

i. The Law Of The Case Doctrine Does Not Apply To An Issue Not Decided By The Trial Court Or The Appellate Court In An Earlier Proceeding.

The Beyers begin their brief and begin the second argument in their brief with the assertion that the law of the case doctrine precluded the trial court from concluding that their claim was barred by laches. *See* I.B. pgs. 1-3, 21-22. This assertion is incorrect and is a clear misapplication of the law of the case doctrine, which "do[es] not apply unless the issues are decided *on appeal.*" *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003) (emphasis in original).

In this case, the trial court did not decide the laches issues in the order reviewed in the 2010 Opinion and this Court did not address laches in its 2010 Opinion. *See Beyer*, 37 So. 3d 932. The issue was only raised by the Appellees as an alternative basis to affirm the trial court's ruling. When not addressed by the court, an issue raised in an answer brief as an alternative basis to affirm a ruling is not governed by the law of the case doctrine. *Williams v. City of Minneola*, 619 So. 2d 983, 987-988 (Fla. 5th DCA 1993) (declining to apply the law of the case doctrine when "in the prior appeal the appellees argued [the issue] as an alternative basis to affirm the summary judgment.").[4]

[4] In *Williams*, the Fifth District also held that the law of the case doctrine could apply to an issue not raised on appeal if the issue could have been raised on appeal. *Williams v. City of Minneola*, 619 So. 2d 983, 987 (Fla. 5th DCA 1993). On that point, the Florida Supreme Court stated that

Clearly, the law of the case doctrine was not intended to preclude a trial court from considering an issue not ruled upon prior to an appeal nor decided by the appellate court on appeal. "[T]he law of the case doctrine ... bars consideration only of those legal issues that were actually considered and decided in a former appeal." *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001). In the first appeal, this Court did not address laches. This is because in the order reviewed in the first appeal, the trial court had not addressed the issue of laches. As a result, the law of the case doctrine did not preclude the trial court from considering the defense of laches on remand, the first time the defense was considered by either court.

ii. The Beyers Claim Is Barred By The Doctrine Of Laches.

"Generally, laches is a doctrine asserted as a defense, which requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)). Unlike a statute of limitations analysis, a laches analysis does not rely upon a clear line of demarcation after which a claim is deemed untimely. Rather, courts address the defense on a case-by-case basis.

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the Fifth District was incorrect. *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 106 at fn 4 (Fla. 2001).

The case law provides guidance. For example, in *McCray*, the Florida Supreme Court framed the "perfect example" for application of the doctrine of laches. *McCray*, 699 So. 2d at 1368. The Court elaborated:

> McCray has waited fifteen years to bring this proceeding and has made no representation as to the reason for the delay . . . The claim could and should have been raised many years ago. The unwarranted filings of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process.

Id. Courts have applied the same reasoning to bar taking claims on laches grounds. *See, e.g., Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F. Supp. 2d 206, 228-229 (D.R.I. 2002) ("Clearly, a twenty-six year delay in bringing suit is unreasonable . . . defendant has been prejudiced . . . the situation as it existed in 1975 cannot be replicated in making a determination of just compensation").

Applying the laches elements and the case law guidance to this case, it is clear the Beyers' claim should be barred. As set forth above, the federal, state and local regulations governing the development of the Property have become more stringent since the date of purchase in 1970, yet the Beyers waited nearly twenty years to bring this action. A two-decade delay in bringing suit demonstrates a clear lack of diligence.

The City and State have, likewise, been prejudiced as a result of the Beyers' delay in bringing suit. Indeed, the expense alone of litigating this lawsuit imposes a tremendous burden on the citizenry of the City and the State. Furthermore,

important evidence regarding the Property has undoubtedly been lost in the decades during which Beyers have sat on their rights. The City and State (and the trial court) will never be able to replicate the condition of, and evidence surrounding, the Property when the alleged taking in this case accrued. The trial court correctly concluded the Beyers' claim is untimely and barred pursuant the doctrine of laches.

V. Conclusion

For the reasons stated herein, the trial court's judgment should be affirmed in all respects.

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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

I HEREBY CERTIFY that on April 4, 2013, the original and three copies of the foregoing document was filed with the Clerk of the Third District Court of Appeal. I also certify that the foregoing document is being served via e-mail this day on the following: mattsonj@bellsouth.net , tobinlaw@terranova.net , tobinlaw2@gmail.com , jon.glogau@myfloridalegal.com .

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