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' REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENTS

A. The Law of Summary Judgments

It is well established that the burden proving the absence of a genuine issue of material fact is on the moving party. The moving party has the burden of proving a negative and must prove the negative **conclusively**. *Holl v. Talcott*, 191 So.2d 40, 43 (Fla. 1966). Unless the movant meets its burden, the opposing party is under no obligation to show that issues remain. Becker v. Kodel, 355 So.2d 852 (Fla. 3rd DCA 1978) *citing Holl.*

A trial court is not authorized to try or weigh facts in ruling on a motion for summary judgment. *Jones v. Stoutenburgh*, 91 So. 2d 299 (Fla. 1956). Summary judgment should be granted cautiously, with full recognition of the right of a litigant to a jury trial on the merits of the case. *Vandyk v. Southside Gun*, Inc., 638 So. 2d 138, 140 (Fla. 1st DCA 1994). On review, the appellate court must consider the evidence in a light most favorable to the nonmoving party and must draw all competing inferences in favor of the nonmoving party. See *McCraney v. Barberi*, 677 So. 2d 355 (Fla. 1st DCA 1996).

B. Summary of Trial Court's Errors

The trial court committed the following errors: i) The trial court determined that "investment backed expectation" was an "element" of an inverse condemnation claim rather than a "factor" to be considered in the Penn Central

analysis; ii) the trial court granted summary judgment even though the Government failed to conclusively negate the Landowner's evidence that the City's decision to prohibit all development was an unconstitutional taking; iii) The trial court misapplied the investment backed expectation analysis by requiring the Landowner to submit an affidavit of a specific "expectation" rather than analyzing the objective facts; and iv) The trial court misapplied the law by finding that laches applies because the Landowner did not develop the property when the regulations allowed development.

C. Summary of the Government's Answer Brief

The Government's Answer Brief includes the following arguments:

1. The trial court properly considered the frustration of the Beyer's investment backed expectation as a necessary *element* of their taking claim; Answer Brief, p. 5;
2. 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. Answer Brief, p. 5.
3. The Beyers failed, entirely, in establishing the investment-backed expectation factor. Answer Brief, p. 8;
4. The trial court correctly concluded that the Beyers failed to produce any evidence whatsoever regarding their

investment backed expectation at the time they purchased the property. Answer Brief, p. 9; and

5. The Beyers are unable to point to any evidence in the record, and thus they cannot show that their distinct investment backed expectations have been frustrated. Answer Brief, p. 10;

6. The Court properly applied the law of laches to bar the Landowners' claim, Answer Brief, p. 11.

II. THE LANDOWNER'S REPLY

A. The Government's Evidence

The Government's did not present any evidence that conclusively proved the Landowners' 1970 decision to purchase property, physically suitable and legally zoned for 8 homes, for $70,000 was **not** an unconstitutional taking. The trial court simply accepted the Government's argument that to defeat a motion for summary judgment the Landowners were required to "point" to evidence in the form of an affidavit of a specific expectation and prove it was investment backed.

Because the Government did not conclusively negate the Landowner's allegations and evidence they had been deprived of all or substantially all economic use, the Court should reverse the final summary judgment.

B. The Penn Central Analysis

The Government relies on *Penn Central v. New York*, 438 U.S. 104 (1978) ("*Penn Central*"), *Dept. of Environmental Protection*, 772 So. 2d 540 (Fla. 1st

DCA 2000) and *Good v. United States*, 189 F. 3d 1355 (Fed. Cir. 1999), as authority for treating "investment backed expectation" as an **element** of a regulatory taking claim.

Penn Central does not support the Government arguments. To the contrary, the Supreme Court in *Penn Central* recognized there is no "set formula" to determine when the government has "gone too far" and must pay just compensation.

> The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. This Court has been unable to develop any ***'set formula'*** for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. [citation omitted] Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by ***it depends largely upon the particular circumstances [in that] case.*** Id at 124.
>
> In engaging in these essentially **ad hoc, factual inquiries,** the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, ***relevant considerations***.

In her concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) Justice O'Connor elaborated on the investment-backed expectations prong of the partial regulatory takings analysis. She concluded that while investment-backed expectations "are not talismanic under Penn Central," they inform the analysis of "whether the application of a particular regulation to particular property 'goes too far.'" Id. at 634.

C. Penn Central Does Not Apply to Total Wipeouts

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ("Lucas"), the Court established a limited exception to the use of the Penn Central analysis in the "extraordinary circumstance when no productive or economically beneficial **use** of land is permitted." Nineteen years later in *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011) ("Koontz"), the Florida Supreme Court adopted the reasoning from *Lucas* by holding the *Penn Central* standards were not applicable when regulations "deprive a property owner of **all beneficial property use.**"

> Aside from regulations that allow physical invasions of private property **or deprive a property owner of all beneficial property use,** regulatory takings challenges are governed by the standard articulated in *Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).*

. . . .

> 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. *Koontz* supra at 1227.

In this case the City of Marathon decided the property should be used forever more as a "bird rookery" and that NO DEVELOPMENT would be allowed (No Clearing - No Docks – No Generators – No Cisterns - No Structures – Nothing). That amounts to a total wipeout or a Lucas taking.

Dept. of Environmental Protection v. Burgess, 772 So. 2d 540 (Fla. 1st DCA 2000) is distinguishable and does not support the Governments' position. The case is factually distinguishable because it involved approximately 160 acres of wetlands inundated by brackish waters eight to twelve months of the year. It is procedurally distinguishable because the case went to trial. It is legally distinguishable because the Court concluded the wetlands were purchased for recreational uses and the landowner did not suffer an economic loss.

The Government's reliance on *Good v. United States*, 189 F. 3d 1355 (Fed. Cir. 1999) is also misplaced. In *Palm Beach Associates v United States*, 231 F. 3d 1354 (Fed. Cir. 2000) the Federal Circuit clarified that the discussion in *Good* about investment backed expectations being an element of a regulatory taking claim was dictum and "part of a broad, general discussion." As noted in the *Initial*

Brief, Good was a "partial taking" case where the owner was allowed to develop the uplands but not the wetlands.

The Federal Circuit relied on *Lucas* to analyze a "total wipeout" as in this case. The Court held ". . . when there is a physical taking or a regulatory taking that constitutes a total wipeout, investment backed expectations play no role." *Id* at 1362.

Therefore, the Court should reject the Governments' arguments: a) That "investment backed expectation" is an **element** of a regulatory taking claim; b) The Landowners were required to "point" to evidence establishing their investment backed expectation; and c) That investment backed expectation is a relevant factor to consider in a total wipeout such as the case at bar.

D. Investment Backed Expectations Are Objectively Based

Assuming that investment backed expectations play a role in the analysis of a total wipe-out, the Federal Circuit in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) ("Cienaga Gardens") explained the investment backed expectation analysis is based on an objective "reasonable man" standard. The critical question is whether it was reasonable "under all of the circumstances" to rely on a state of affairs that **did not include** the challenged regulatory regime. See also, See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) ; *Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1348-49 (Fed. Cir. 2004); and *Mehaffy v. United*

States, 2012 U.S. App. LEXIS 25178 (Fed. Cir. 2012) (reasonable investment backed expectations are measured at the time the claimant acquires the property).

The evidence in this case is undisputed: 1) In 1970 the Beyers paid $70,000 for property that was zoned GU; 2) At the time of purchase the Beyers could have built 8 homes as of right; and 3) The State of Florida and the Army Corps of Engineers issued a dock permit for access to the island.

It is therefore *objectively* clear that the Beyers had a reasonable investment backed expectation the property could be developed with at least 8 homes. The Beyers were not required to supplement the *objective* facts by submitting an affidavit of what they expected or wanted to build, i.e., 1 home, 8 homes, or an airport. That is because a landowners' subjective intent does not trump the objective facts, which in this case was the **absence** of any regulations that would have hindered the development of 8 homes.

The Court should reject the Government's argument that the Landowner's subjective intent is dispositive on the issue of reasonableness.

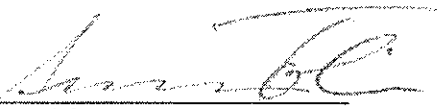
E. The Doctrine Of Laches Does Not Apply

There is not much to add to the arguments set forth in the Initial Brief, except perhaps to borrow a comment from the decision in *Beyer v. City of Marathon*, 37 So. 3d 932 (Fla. 3rd DCA 2010).

Because the Supreme Court of Florida did not recognize regulatory takings until 1990, (See, *Joint Ventures v. Dept. of Transportation*, 563 So. 2d 622 (Fla. 1990)), and because a property owner is required to exhaust administrative remedies and ripen their claim by obtaining a final decision from the governing body - it is "patently unfair, if not absurd" for the Government to claim the doctrine of laches should be applied in this case.

III. CONCLUSION

Based on the foregoing arguments and authorities, Appellants Gordon Beyer and Molly Beyer, respectfully pray the Court issue a decision that a) Reverses the final summary judgment; b) Remands the case for a trial on the merits; c) Clarifies the law of regulatory takings for a total wipeout; and d) Awards Appellants their costs and attorneys fees.



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IV. CERTIFICATE OF SERVICE

I CERTIFY THAT a true copy of the foregoing was furnished to **JOHN HERIN, ESQ.** and **JEFFREY T. KUNTZ, ESQ.** Attorneys for the City of Marathon, Florida, and **JONATHAN A. GLOGAU, ESQ.** Chief, Complex Litigation, Attorney Generals Office, PL-01, The Capitol, Tallahassee, FL 32399-1050, by EMAIL on this 8TH day of May 2013.

Andrew M. Tobin, Esq.

V. CERTIFICATE OF FONT COMPLIANCE

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

Andrew M. Tobin, Esq.