# FIRST DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

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No. 1D21-3696

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CHRISTOPHER D'ARCY and
D'ARCY KENNEL, LLC,

Appellants,

v.

FLORIDA GAMING CONTROL
COMMISSION,

Appellee.

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On appeal from the Circuit Court for Leon County.
Angela C. Dempsey, Judge.

May 24, 2023

PER CURIAM.

Christopher D'Arcy and D'Arcy Kennel (D'Arcy) appeal the summary final judgment granted in their civil case. In that case, D'Arcy sought damages for the taking of their personal property which they alleged occurred upon the passage of Amendment 13 to the Florida Constitution. We affirm.

In November 2018, a majority of Florida voters approved Amendment 13. By this amendment, now article X, section 32 of the Florida Constitution, the racing of greyhounds or any other domesticated breed of dog in connection with a wager for money or

other item of value was forbidden as of January 1, 2020. Also outlawed was the wagering of money or anything of value on the outcome of dog racing in Florida.

At the time of the passage of Amendment 13, Christopher D'Arcy owned and managed a greyhound racing business in Florida. He claimed that he and his kennel business were deprived of "all economically viable use of their property" as a result of Amendment 13, and therefore, he filed suit seeking recompense under the takings clause of the Fifth Amendment and article X, section (6)(a) of the Florida Constitution.[1] The defendants[2] ultimately moved for summary judgment. After receiving written argument and conducting a hearing, the trial court granted summary judgment on multiple grounds. We review a trial court's ruling on summary judgment de novo. *Washington v. Fla. Dep't of Revenue*, 377 So. 3d 502, 508 (Fla. 1st DCA 2022).

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[1] On appeal, D'Arcy has not made separate arguments for their claim of a taking on the federal and state constitutions. Generally, the analysis under state and federal takings jurisprudence is the same. *See Tampa–Hillsborough Cnty. Expressway Auth. v. A.G.W.S. Corp.,* 640 So.2d 54, 58 (Fla.1994); *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1226 (Fla. 2011) (explaining the Court "has interpreted the takings clauses of the United States and Florida Constitutions coextensively"), *rev'd on other grounds*, 570 U.S. 595 (2013); *see also Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 949 (11th Cir. 2018) ("Because Florida follows federal takings law, we can look to cases brought under the Fifth Amendment to inform our analysis.")

[2] Initially, the Florida Department of Business and Professional Regulation (DBPR), and Halsey Beshears, as Secretary of DBPR, were named as defendants. During the pendency of the instant appeal, the Florida Gaming Control Commission was substituted as Appellee since all duties related to pari-mutuel wagering were transferred from DBPR to the Gaming Commission by operation of Chapter 2021-269, § 11(1), Laws of Florida. We find no merit in the Commission's suggestion that D'Arcy listed the wrong defendants when the complaint was filed.

Among the grounds used by the trial court was the conclusion of law that D'Arcy could not establish a taking under the factors outlined in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). In *Penn Central*, the United States Supreme Court explained that there is no "set formula" for identifying a taking forbidden by the Fifth Amendment. *Id*. at 123. Instead, the Court has utilized "ad hoc, factual inquiries into the circumstances of each particular case" and has identified three factors to aid in such inquiries. *Connolly v. Pension Benefit Guar. Corp*., 475 U.S. 211, 225 (1986) (quoting *Penn Central*, 438 U.S. at 124). Those factors are: (1) the plaintiff's reasonable investment-backed expectations; (2) the character of the government action; and (3) the regulation's economic impact on the property. *Id*.

As was the case in *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1215 (N.D. Fla. 2020), a "virtually identical" case to the instant one in the trial court's mind, D'Arcy's lack of reasonable investment-backed expectations defeated the takings claim. That is, given the heavily regulated field of gambling, D'Arcy did not have a reasonable expectation that the investment in dog racing could not be severely impacted by regulation.

It should be noted that when personal property is the subject of an alleged taking, there should be an even greater expectation that an investment could be severely impacted by state action. As the United States Supreme Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–28 (1992), because of a "State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless."

Amendment 13 forbids betting on dog racing, not dog racing per se. Pari-mutuel gambling has long been heavily regulated in Florida. *See* § 550.1625(1), Fla. Stat. (2018) ("The operation of a dog track and legalized pari-mutuel betting at dog tracks in this state is a privilege and is an operation that requires strict supervision and regulation in the best interests of the state."); *License Acquisitions, LLC v. Debary Real Estate Holdings, LLC*, 155 So. 3d 1137, 1148 (Fla. 2014) ("Pari-mutuel wagering is a

heavily regulated industry in Florida."); *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club*, *Inc.*, 434 So. 2d 879, 881 (Fla. 1983) ("[B]ecause of the nature of the enterprise, authorized gambling, this state may exercise greater control and use the police power in a more arbitrary manner."); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.,* 399 F.3d 1276, 1278 (11th Cir. 2005) (describing Florida's pari-mutuel industry as being subject to an "extensive and complex regulatory scheme").[3]

It is not surprising that reasonable investment-backed expectations "are greatly reduced in a highly regulated field." *Branch v. U*.S., 69 F.3d 1571, 1581 (Fed. Cir. 1995). Given the extensive history of state regulation of gambling, it is not reasonable that D'Arcy had no expectation of future governmental interference with their property investments, as they as claimed. Because one of the factors of *Penn Central* may be dispositive of a takings claim as a whole, we affirm the grant of summary judgment on this ground. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (indicating that a single *Penn Central* factor may be dispositive of a takings case).

The operation of Amendment 13 does not deprive racing dog owners of their property; it merely regulates its use. Thus, we also affirm summary judgment on the alternative ground that Amendment 13 was a valid exercise of police power, not eminent domain. Regulation of gambling does not constitute a taking as it is a well-established, valid exercise of police power. *See Gulfstream Park Racing Ass'n*, 399 F.3d at 1278 ("The regulation of gambling lies at the heart of the state's police power.") (citations and quotation omitted); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) ("If this ordinance is otherwise a valid exercise of

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[3] Our decision in *State v. Basford*, 119 So. 3d 478 (Fla. 1st DCA 2013), is therefore distinguishable. There, we affirmed a takings claim when gestation crates were made illegal "as a result of article X, section 21 of the Florida Constitution, which is commonly referred to as the 'Pregnant Pig Amendment.'" *Id.* at 479. Although not the focus of our decision in *Basford*, farming and animal husbandry, while regulated, are not comparable to the highly regulated field of gambling.

the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *see also Support Working Animals*, 457 F. Supp. 3d at 1215 ("Whether Amendment 13's purpose was to protect the health and welfare of racing dogs or to prohibit wagering on dog races, Amendment 13 is a legitimate exercise of Florida's police power.").[4]

The trial court was correct to conclude that no taking occurred upon Amendment 13 becoming operative. As a result, it was correct to grant summary judgment.

AFFIRMED.

LEWIS, BILBREY, and KELSEY, JJ., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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Paul M. Hawkes, Tallahassee; Kevin Alvarez of Law Office of Kevin Alvarez P.A., Tallahassee; Jeffrey D. Kottkamp of Jeff Kottkamp, P.A., Tallahassee, for Appellants.

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[4] "If the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power." *Graham v. Estuary Prop.*, 399 So. 2d 1374, 1381 (Fla. 1981). "[T]he State has an important public interest in limiting gambling. . . ." *Boardwalk Bros., Inc. v. Satz*, 949 F.Supp.2d 1221, 1232 (S.D. Fla. 2013). *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988), cited by D'Arcy is therefore distinguishable. There, the Court held a taking occurred when healthy citrus trees were destroyed "thereby conferring a public benefit rather than preventing a public harm." *Id.* at 103. Here, Amendment 13 prevented a public harm and was not a taking. *See Support Working Dogs*, 457 F. Supp. 3d at 1215.

Ashley Moody, Attorney General, Tallahassee; Henry C. Whitaker, Solicitor General, Jeffrey Paul DeSousa, Chief Deputy Solicitor General, David M. Costello, Deputy Solicitor General, and Miguel A. Olivella, Jr., Special Counsel, Tallahassee, for Appellee.